

Reconceiving Forced Marriage into Armed Groups as Forced Recruitment in International Refugee Law

Christel Querton*

Abstract

Forced marriage is widespread, occurring in armed conflicts around the world, with armed groups increasingly relying on the practice. Women at risk of, or who have experienced, forced marriage into armed groups may cross international borders and seek asylum in host countries where international refugee law applies. This article provides a unique in-depth analysis of the practice of forced marriage into armed groups under international refugee law. The article demonstrates how inter-disciplinarity enables us to conceive of forced marriage into armed groups as a form of forced recruitment and thereby interpret it as arising for reasons of imputed political opinion in international refugee law. The conceptualization is important, as the main cause of forcible displacement today is violence in armed conflicts. Moreover, it redresses the traditional view of forced marriage as a private and cultural practice imposed by women's family members and their ethnic or religious communities by revealing its instrumental nature and its strategic and political practice in the context of armed conflicts. The article calls for revised guidance to address the current knowledge and policy gap in international refugee law.

* Senior Lecturer in Law, Bristol Law School, College of Business and Law, University of the West of England, United Kingdom. Email: Christel.Querton@uwe.ac.uk. Many thanks to Professor James A. Green, the *European Journal of International Law* editors and the five anonymous reviewers for helpful feedback. Earlier drafts of this article were presented at the annual conference of the Society of Legal Scholars in September 2024, to the Research in Public International Law group at the University of the West of England in January 2025 and to the Refugee Law Initiative Working Group on Feminist Theory, Refugees and Displacement in February 2025.

1 Introduction

Forced marriage occurs in conflicts around the world. It is most common in Africa and Asia, but it occurs in all geographical regions.¹ Statistics may suffer from under-reporting, but the United Nations (UN) estimates that more than 650 million women were married as children and at least 12 million girls are married every year.² Whilst statistics do not differentiate between forced marriage in conflict and that in peacetime, forced marriage is particularly prevalent in countries experiencing armed conflicts and in poor humanitarian conditions.³ This article focuses on one aspect of forced marriage during armed conflicts – namely, forced marriage into non-state armed groups. This aspect of the wider problem is relevant because, as the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) has highlighted, armed groups are increasingly relying on the practice of forced marriage during conflict.⁴ For example, the Taliban were regularly forcing women to marry their fighters when they were a non-state armed group between 2001 and 2020.⁵ Forced marriage between civilians and armed group members is used as a tactic of war by armed groups with different ideologies, including the Lord's Resistance Army (LRA) in Uganda, the Kachin Independence Organization / Kachin Independence Army (KIO/KIA) in Myanmar, Al-Shabaab in Somalia, Boko Haram in Nigeria and the Islamic State of Iraq and Syria (ISIS) in Syria.⁶

Women at risk of, or who have experienced, forced marriage into armed groups may cross international borders and seek asylum in host countries

¹ Including in countries such as the Democratic Republic of the Congo, Iraq, Mali, Myanmar, Somalia, South Sudan, Sudan, Syria and Yemen. Oosterveld, 'Forced Marriage during Conflict and Mass Atrocity', in F. Ní Aoláin *et al.* (eds), *The Oxford Handbook of Gender and Conflict* (2018) 240, at 240; Ellsberg *et al.*, "If You Are Born a Girl in This Crisis, You Are Born a Problem": Patterns and Drivers of Violence against Women and Girls in Conflict-Affected South Sudan', 27 *Violence against Women* (2021) 3030; P. Donnelly and E. Myers, *Forced Marriage by Non-State Armed Groups: Frequency, Forms, and Impact* (2023), at 6, available at www.ipinst.org/2023/04/forced-marriage-by-non-state-armed-groups-frequency-forms-and-impact.

² UNICEF, 'Fast Facts: 10 facts Illustrating Why We Must #EndChildMarriage' (2019), available at <https://www.unicef.org/eca/press-releases/fast-facts-10-facts-illustrating-why-we-must-endchildmarriage>.

³ United Nations Office of the High Commissioner for Human Rights (OHCHR), Child, Early and Forced Marriage in Humanitarian Settings, Doc. A/HRC/41/19, 26 April 2019, para. 2.

⁴ CEDAW Committee, CEDAW General Recommendation no. 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations, UN Doc. CEDAW/C/GC/30, 18 October 2013, para. 62.

⁵ Donnelly and Myers, *supra* note 1, at 1.

⁶ UN Secretary General, Conflict-Related Sexual Violence, Doc. S/2025/389, 15 July 2025; Donnelly and Myers, *supra* note 1, at 5–6; Mazurana, Marshak and Spears, 'Child Marriage in Armed Conflict', 101 *International Review of the Red Cross* (2019) 575, at 593.

where international refugee law applies.⁷ The main international treaty governing the obligations of states in protecting persons fleeing persecution is the 1951 UN Refugee Convention.⁸ It defines a refugee as a person who, 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.⁹ In both policy and practice, women's asylum claims involving gender-based violence, such as forced marriage, tend to be examined in relation to the Refugee Convention's reason of membership of a particular social group.¹⁰ This is problematic because membership of a particular social group is the ground that is most subject to conflicting interpretations and litigation, resulting in narrow and convoluted definitions of social groups. This presents a pervasive challenge for women in need of international protection whose asylum claims are subsequently more likely to be rejected.¹¹

The UN has adopted the term 'child, early and forced marriage' to describe the issue in its various forms and circumstances. 'Child marriage' is used to describe marriage in which at least one of the parties is a child.¹² Child marriage is a form of forced marriage, given that one or both parties have not expressed full, free and informed consent.¹³ 'Early marriage' is used to describe 'marriages involving a person aged below 18 in countries where the age of majority is attained earlier or upon marriage' and other situations where the personal characteristics of the parties render them not ready to consent.¹⁴ Finally, the UN defines 'forced marriage' as 'any marriage which occurs without the full and free consent of one or both of the parties and/

⁷ The crossing of borders by women forcibly married to members of armed groups may be involuntary, and many are trafficked internationally as armed groups move across borders. See, e.g., UNODC, *Global Report on Trafficking in Persons in the Context of Armed Conflict* (2018), at 10–11. The relevance of the anti-trafficking legal framework for refugee protection, however, is outside the scope of this article. In addition, the birth of children in other countries following a forced marriage into an armed group raises issues of statelessness, which are also outside the scope of this article. However, both aspects deserve further attention in the field of international refugee law.

⁸ Convention Relating to the Status of Refugees (Refugee Convention) 1951, 189 UNTS 137.

⁹ *Ibid.*, Art. 1A(2).

¹⁰ Querton, 'One Step Forward, Two Steps Back? Interpreting "Particular Social Group" in the European Union', 71(2) *International and Comparative Law Quarterly* (2022) 425.

¹¹ Foster, 'Why We Are Not There Yet: The Particular Challenge of "Particular Social Group"', in E. Arbel, C. Dauvergne and J. Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (2014) 17, at 18.

¹² A child is defined as a person 'below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. UN Convention on the Rights of the Child 1989, 1577 UNTS 3, Art. 1.

¹³ OHCHR, Preventing and Eliminating Child, Early and Forced Marriage, Doc. A/HRC/26/22, 2 April 2014, para. 4.

¹⁴ *Ibid.*, para. 5.

or where one or both of the parties is/are unable to end or leave the marriage, including as a result of duress or intense social or family pressure'.¹⁵ Whilst women, girls, men and boys may be subjected to forced marriage,¹⁶ the ensuing human rights violations have a disproportionately negative impact on women and girls.¹⁷ This article focuses on women because the majority of victims are women,¹⁸ and it does not discuss the specific aspects that may arise in the asylum claims of girls as this deserves separate attention and is outside the scope of this article. The article will nonetheless include references to girls where those are relevant to understanding the nature of the practice.

The article examines how international refugee law should address the practice of forced marriage into armed groups in the context of widespread violence in a broad sense. Whilst the relevant country situation will often be characterized by armed conflicts and widespread violence, the scope of analysis is not limited to countries experiencing international or non-international armed conflicts as defined in international humanitarian law. Indeed, the threshold questions applicable in international humanitarian law are irrelevant to the application of international refugee law.¹⁹ The article also discusses the definition of forced marriage as a crime against humanity in the context of the widespread and systematic attack against civilian population in international criminal law for the purpose of understanding the characteristics, including the multifaceted elements of harm and the circumstances of coercion.

This article provides a unique in-depth analysis of the practice of forced marriage into armed groups under international refugee law. Although the article discusses forced marriage as it occurs in different armed conflicts and in different regions of the world, the practice is not monolithic. Indeed, experiences of forced marriage vary in instrumentality and symbolic function and amongst individuals.²⁰ The article claims that, whereas refugee legal scholars have been receptive to crossing legal boundaries to interpret the Refugee Convention's definition – in particular, into international human

¹⁵ *Ibid.*, para. 6.

¹⁶ See, e.g., Denov and Drumbl, 'The Many Harms of Forced Marriage: Insights for Law from Ethnography in Northern Uganda', 18 *Journal of International Criminal Justice* (2020) 349.

¹⁷ GA Res. 73/153, 17 December 2018, preamble.

¹⁸ O'Brien, "'Don't Kill Them, Let's Choose Them as Wives': The Development of the Crimes of Forced Marriage, Sexual Slavery and Enforced Prostitution in International Criminal Law', 20(3) *International Journal of Human Rights* (2016) 386, at 386.

¹⁹ Case C-285/12, *Aboubacar Diakité v. Commissaire Général aux Réfugiés et aux Apatrides* (EU:C:2014:39), paras 21–28.

²⁰ Hynd, "'To Be Taken as a Wife Is a Form of Death': The Social, Military, and Humanitarian Dynamics of Forced Marriage and Girl Soldiers in African Conflicts, c. 1990–2010', in A. Bunting, B.N. Lawrance and R.L. Roberts (eds), *Marriage by Force? Contestation over Consent and Coercion in Africa* (2016) 292, at 305.

rights law²¹ – they also have much to gain from adopting inter-disciplinary perspectives. In particular, the article demonstrates how considering knowledge acquired in political sciences and social sciences, including politics, international relations, anthropology or history, when applying international refugee law enables us to conceive of forced marriage into armed groups as a form of forced recruitment. This perspective enables a new approach to the interpretation of the required nexus between the serious harm and the reasons for persecution. More specifically, serious harm resulting from forced marriage into armed groups may be interpreted as arising for reasons of imputed political opinion in international refugee law rather than for reasons of membership of a particular social group.

This approach serves to counter current practice by asylum decision-makers who interpret forced marriage in relation to the Refugee Convention's reason of membership of a particular social group, causing women to be unfairly denied refugee protection. It also redresses the traditional view of forced marriage as a private and cultural practice imposed by women's family members and their ethnic or religious communities by revealing its instrumental nature and its strategic and political practice in the context of armed conflicts. The article brings to the fore the practice of forced marriage into armed groups by integrating a gender perspective into the understanding of violence in situations of armed conflicts, thereby ensuring a fairer determination of asylum claims in practice. The reconceptualization of forced marriage into armed groups as a form of forced recruitment is likely to impact a large number of asylum claims globally, as the main cause of forcible displacement today is violence in armed conflicts.²²

Following this introduction, the second section of this article reviews how international refugee law and policy have failed to acknowledge and address the issue of forced marriage into armed groups. The third section sets out the concept of forced marriage in international law, including international human rights law, international criminal law and international humanitarian law. The fourth section then provides a reconceptualization of forced marriage into armed groups as a form of forced recruitment by armed groups in international refugee law. The fifth section provides an assessment of how asylum claims based on a fear of forced marriage into armed groups should subsequently be determined. The sixth section addresses a potential implication of reconceptualizing forced marriage into armed groups as a form of

²¹ Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law', in R. Rubio-Marín (ed.), *Human Rights and Immigration* (2014) 19, at 19–72.

²² Whilst data regarding why individuals claim asylum is not generally collected or made available publicly, data shows that there were 8.4 million outstanding asylum claims at the end of 2024. United Nations High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2024* (2025), available at www.unhcr.org/global-trends-report-2024.

forced recruitment in international refugee law, namely exclusion from refugee protection. The conclusion calls for revised refugee law guidance in this area to address the knowledge and policy gap identified in this article.

2 Forced Marriage in International Refugee Law and Policy

To be recognized as a refugee, a person must be outside their country of nationality or habitual residence; demonstrate a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and lack state protection. Women and girls at risk of forced marriage in general face significant obstacles in being recognized as refugees under the Refugee Convention.²³ This is linked to the broader failure to integrate a gender perspective into the interpretation of international refugee law in policy and practice.²⁴

Jurisprudence concerning the interpretation of the refugee definition in forced marriage cases has been inconsistent across jurisdictions.²⁵ Women seeking international protection from forced marriage have been refused asylum by some courts because it was not accepted that forced marriage (by itself) is a sufficiently severe form of harm to reach the level of persecution.²⁶ Other judicial decision-makers tend to adopt a very

²³ Zona Sharfman, 'The Lost Girls of Sudan: Forced Marriage as a Vehicle for Asylum', 29 *Women's Rights Law Reporter* (2007) 149; Dauvergne and Millbank, 'Forced Marriage as a Harm in Domestic and International Law', 73 *Modern Law Review* (2010) 57; Honkala, 'She, of Course, Holds No Political Opinions': Gendered Political Opinion Ground in Women's Forced Marriage Asylum Claims', 26 *Social and Legal Studies* (2017) 166; Fell, 'From Family, They Flee: Asylum for Victims of Forced Marriage', 84(3) *Brooklyn Law Review* (2019) 1027.

²⁴ Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2010', 29 *Refugee Survey Quarterly* (2010) 21; Arbel, Dauvergne and Millbank, 'Introduction: Gender in Refugee Law: From the Margins to the Centre', in E. Arbel, C. Dauvergne and J. Millbank (eds), *Gender in Refugee Law: from the Margins to the Centre* (2014) 1; Querton, 'Gender and the Boundaries of International Refugee Law: Beyond the Category of "Gender-Related Asylum Claims"', 37 *Netherlands Quarterly of Human Rights* (2019) 379, at 385; Dauvergne, 'Women in Refugee Jurisprudence', in C. Costello, M. Foster and J. McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 728, at 728–729.

²⁵ Lobeiras, 'The Right to Say I Don't: Forced Marriage as Persecution in the United Kingdom, Spain, and France', 52(3) *Columbia Journal of Transnational Law* (2014) 896.

²⁶ Dauvergne and Millbank, *supra* note 23 (in Australia, Canada and the United Kingdom [UK]); Millbank and Dauvergne, 'Forced Marriage and the Exoticization of Gendered Harms in United States Asylum Law', 19 *Columbia Journal of Gender and Law* (2010) 898 (in the USA); Seelinger, 'Forced Marriage and Asylum: Perceiving the Invisible Harm', 41(1) *Columbia Human Rights Law Review* (2010) 55 (North America, Europe and Australasia); Nanasi, 'An I Do I Choose: How the Fight for Marriage Access Supports a Per Se Finding of Persecution for Asylum Cases Based on Forced Marriage', 28 *Columbia Journal of Gender and Law* (2014) 48 (in the USA); Lobeiras, *supra* note 25 (in the UK), at 918–919; Honkala, 'An Unhappy Interlude': Trivialisation and Privatisation of Forced Marriage in Asylum-Seeker Women's Cases in the UK', 41 *Refugee Survey Quarterly* (2022) 472 (in the UK).

narrow understanding of consent, whereby women's age, education, residence in urban areas, past employment and travel history were considered to demonstrate their ability to oppose being married against their will and, thus, as evidence of the absence of risk of forced marriage on return, leading to the denial of refugee status.²⁷ Furthermore, there is a tendency in forced marriage asylum adjudication to frame claims as a composite of various forms of harms that derive from the forced marriage context, such as domestic violence, rape, polygamy, torture and sexual enslavement, rather than focusing on the forced marriage itself.²⁸ This approach has been critiqued for flattening and erasing the narratives of women seeking asylum.²⁹

Finally, asylum decision-makers determine the asylum claims of women fleeing gender-based violence, including forced marriage, predominantly in relation to the Refugee Convention's reason of membership of a particular social group.³⁰ However, this ground of the Refugee Convention is the most litigated and debated. As decision-makers increasingly impose additional requirements to the existence of the group, this results in conflicting and restrictive legal interpretation. Consequently, women fleeing forced marriages are likely to be refused asylum because they are deemed not to constitute a particular social group.³¹ Overall, Catherine Dauvergne has described forced marriage cases as a prime example of why progressive and gender-sensitive higher court judgments and government policy have not been implemented at the first-instance decision-making level.³² Although circumstances surrounding forced marriage ought to be straightforward to evaluate due to numerous human rights instruments that address the issue and the near-universal absence of state protection, forced marriage claims continue to be repeatedly rejected by decision-makers.³³

Despite these highly critical views of how international refugee law is applied and interpreted in forced marriage claims,³⁴ and the increase in the number of persons fleeing conflicts,³⁵ refugee law literature on forced

²⁷ Millbank and Dauvergne, *supra* note 26, at 961.

²⁸ See, e.g., Lawrance and Walker-Said, 'Resisting Patriarchy, Contesting Homophobia: Expert Testimony and the Construction of Forced Marriage in African Asylum Claims', in A. Bunting, B.N. Lawrance and R.L. Roberts (eds), *Marriage by Force? Contestation over Consent and Coercion in Africa* (2016) 199, at 202, 217.

²⁹ *Ibid.*

³⁰ Querton, *supra* note 10.

³¹ Foster, *supra* note 11, at 17. See, for example, the recent judgment by the US Court of Appeals for the Sixth Circuit upholding the Board of Immigration Appeals' decision to reject 'Salvadoran women' as a particular social group for not being sufficiently cognizable. *Elizabeth Cristales-de Linares et al. v. Bondi*, No. 25-3152 (6th Cir. 2025), 1 December 2025.

³² Dauvergne, *supra* note 24, at 742.

³³ *Ibid.*

³⁴ See scholarship cited at notes 23 and 26 above.

³⁵ There were 123.2 million people forcibly displaced as a result of persecution, conflict, violence, human rights violations and events seriously disturbing public order by the end of

marriage does not examine the practice in the context of armed conflicts and widespread violence.³⁶ In parallel, the literature on conflict refugees has yet to enquire in detail into this form of serious harm.³⁷ At the policy level, the lack of analysis and convergence between the practice of forced marriage and the context of armed conflict is also apparent. To illustrate, the Office of the United Nations High Commissioner for Refugees' (UNHCR) Guidelines on Gender-Related Persecution mention forced marriage only once in the section on procedural issues when listing examples of the types of harm that women fear but may fail to identify if asked questions in asylum interviews about having experienced 'torture'.³⁸ The UNHCR's Guidelines on Membership of a Particular Social Group do not mention forced marriage at all. Apart from references being made to women 'nursing sick rebel soldiers' in relation to the interpretation of the Refugee Convention's reason for persecution of political opinion,³⁹ there is no mention of the context of armed conflict in either of these guidelines. In 2014, the UNHCR adopted the Guidelines on Military Service, which also include guidance on forced recruitment by non-state armed groups. Whilst these guidelines note that 'forced recruitment by non-state groups to carry out non-military works could amount to, *inter alia*, forced labour, servitude and/or enslavement and constitute persecution',⁴⁰ and refer to children who spent time 'in a support role to armed groups' (as opposed to

2024, and almost three-quarters of all refugees and other people in need of international protection originated from just five countries (Venezuela, Syria, Afghanistan, Ukraine and South Sudan). UNHCR, *supra* note 22, at 38–39.

³⁶ For example, forced marriage in conflict is discussed in only two sentences in Bailliet, 'Persecution in the Home', 30 *Nordic Journal of Human Rights* (2012) 36, at 48. Although forced marriage is also common outside of armed conflicts and is also perpetrated by actors other than non-state armed groups.

³⁷ Oosterveld, *Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention*, Doc. PPLA/2012/06 (2012), available at www.refworld.org/reference/lpprs/unhcr/2012/en/89566; V. Holzer, *Refugees from Armed Conflict: The 1951 Refugee Convention and International Humanitarian Law* (2015); C. Lülfi, *Conflict Displacement and Legal Protection: Understanding Asylum, Human Rights and Refugee Law* (2019); C. Querton, *Conflict Refugees: European Union Law and Practice* (2023).

³⁸ UNHCR, Guidelines on International Protection no. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/GIP/02/01, 7 May 2002, para. 36(vii).

³⁹ UNHCR, Guidelines on International Protection no. 2: 'Membership of a Particular Social Group' within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/GIP/02/02, 7 May 2002, para. 33.

⁴⁰ UNHCR, Guidelines on International Protection no. 10: Claims to Refugee Status Related to Military Service within the Context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/GIP/13/10/Corr. 1, 12 November 2014, para. 35.

fighting),⁴¹ the fact that forced marriage is a practice of fighting parties is not acknowledged.⁴²

The UNHCR's Guidelines on Armed Conflict helpfully highlight how 'sexual and gender-based violence, including rape, human trafficking, sexual slavery and conjugal slavery/forced marriage, are common forms of persecution in many situations of armed conflict and violence' and that these may be used as a 'deliberate military or political strategy to debase, humiliate, terrorize or destroy civilian populations in pursuit of broader goals'.⁴³ However, there is no further guidance on how forced marriages, in particular, may be strategically deployed by armed groups. Yet again, it is notable how the practice of forced marriage is subsumed into a list of forms of gender-based violence without discernment. A deeper and more nuanced understanding of forced marriage into armed groups is needed in the field of international refugee law for states to discharge their obligations adequately in respect of persons fleeing contemporary armed conflicts. This will ensure that these types of claims are rendered visible and that the Refugee Convention's definition is appropriately applied and interpreted.

The gap in knowledge and policy is striking because, as recognized by the UN General Assembly, the risk of forced marriage is highly exacerbated in conflict.⁴⁴ Indeed, forced marriage increases in times of conflict due to physical and economic insecurity and strategic reliance on the practice by non-state armed groups.⁴⁵ In respect of the latter, forced marriages occur as a direct result of conflict when armed groups abduct and traffic women and girls who are then forced to marry their fighters.⁴⁶ Notably, Phoebe Donnelly and Emily Myers have demonstrated that forced marriage is used by almost as many non-state armed groups as those who commit rape during conflicts.⁴⁷ Further, the contextual circumstances of

⁴¹ *Ibid.*, para. 70.

⁴² The Introductory Note to the Guidelines also does not expand on forced recruitment and/or conditions of service in non-state armed groups. Türk and Edwards, 'Introductory Note to the Guidelines on International Protection no. 10 on Claims to Refugee Status Related to Military Service', 27 *International Journal of Refugee Law (IJRL)* (2015) 166.

⁴³ UNHCR, Guidelines on International Protection no. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions, UN Doc. HCR/GIP/16/12, 2 December 2016, para. 26.

⁴⁴ GA Res. 73/153, A/RES/73/153, 17 December 2018, preamble.

⁴⁵ Human Rights Council, Res. 41/8, UN Doc. A/HRC/RES/41/, 11 July 2019, 8; Donnelly and Myers, *supra* note 1.

⁴⁶ International Labour Organization (ILO), Walk Free and International Organisation for Migration, Global Estimates of Modern Slavery: Forced Labour and Forced Marriage (2022), at 61, 104, available at www.ilo.org/publications/major-publications/global-estimates-modern-slavery-forced-labour-and-forced-marriage.

⁴⁷ Donnelly and Myers, *supra* note 1.

a situation of armed conflict are the primary determinant in shaping child marriages.⁴⁸

3 Forced Marriage in International Law

In the strictest sense, the notion of ‘forced marriage’ refers to the lack of consent by one or both of the parties to the marriage and is contrary to international human rights law. The Universal Declaration on Human Rights first provided that ‘marriage shall be entered into only with the free and full consent of the intending spouses’.⁴⁹ The right not to enter into a marriage without the free and full consent of both spouses was enshrined in the Convention on Consent to Marriage⁵⁰ and, later, in the International Covenant on Civil and Political Rights⁵¹ and the International Covenant on Economic, Social and Cultural Rights.⁵² The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has expanded the right to include ‘the same right freely to choose a spouse and to enter into marriage only with their free and full consent’.⁵³ The CEDAW Committee has noted that women’s experiences in conflict and post-conflict situations are impacted by inequalities in marriage.⁵⁴ The Council of Europe’s Convention on Violence against Women and Domestic Violence recognizes with grave concern that women and girls often experience serious violations of human rights, such as forced marriage which is ‘a major obstacle to the achievement of equality between women and men’.⁵⁵

⁴⁸ Mazurana, Marshak and Spears, *supra* note 6, at 598.

⁴⁹ Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948, Art. 16(2).

⁵⁰ Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962, 521 UNTS 231, Art. 1(1) (which states that ‘[n]o marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law’).

⁵¹ International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171, Art. 23(3) (which states that ‘[n]o marriage shall be entered into without the free and full consent of the intending spouses’).

⁵² International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3, Art. 10(1) (which states that ‘[m]arriage must be entered into with the free consent of the intending spouses’).

⁵³ Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13, Art. 16(1)(b) (which states that ‘States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: the same right freely to choose a spouse and to enter into marriage only with their free and full consent’).

⁵⁴ CEDAW Committee, *supra* note 4, para. 62.

⁵⁵ Convention on Preventing and Combatting Violence against Women and Domestic Violence (Istanbul Convention) 2011, CETS 210.

Forced marriage is not only a human rights violation in its own right but it also leads to a myriad of associated human rights violations. The Human Rights Council has noted that:

child, early and forced marriage constitutes a violation, abuse or impairment of human rights and a harmful practice that prevents individuals from living their lives free from all forms of violence, and that it has wide-ranging and adverse consequences for the enjoyment of human rights, such as the right to education and the right to the highest attainable standard of health, including sexual and reproductive health.⁵⁶

Thus, there are a multitude of human rights violations associated with forced marriage, in addition to sexual violence. These include limitations of freedom of movement, denial of the right to pursue education or work, limited income-generating opportunities and isolation from family.

The UN considered that the transfer of women for marriage in exchange for consideration or through inheritance without their consent amounts to institutions and practices similar to slavery as early as 1956 in the Supplementary Slavery Convention, which requires states to bring about the abolition of such practices.⁵⁷ The multiple aspects of ill-treatment resulting from forced marriage led the UN Special Rapporteur on Contemporary Forms of Slavery to describe it as a form of sexual slavery in 1998. More specifically, the rapporteur noted that the crime of ‘sexual slavery also encompasses situations where women and girls are forced into “marriage”, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors’.⁵⁸

International humanitarian law prohibits outrages upon personal dignity, including humiliating and degrading treatment.⁵⁹ Furthermore, specific provisions refer to the protection of women including ‘against rape, enforced prostitution, or any (other) form of indecent assault’.⁶⁰ In

⁵⁶ Human Rights Council, Resolution 29/8, Doc. A/HRC/RES/29/8, 22 July 2015, para. 1.

⁵⁷ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956, 266 UNTS 3, Art. 1(c).

⁵⁸ G.J. McDougall, Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict: Final Report, UN Doc. E/CN.4/Sub/2/1998/13 (1998), para. 30.

⁵⁹ Common Art. 3 of Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85; Geneva Convention III relative to the Treatment of Prisoners of War 1949, 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287.

⁶⁰ Geneva Convention IV, *supra* note 59, Art. 27(2); Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3, Arts 75(2)(b), 76(1); Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609, Art. 4(2)(c).

international criminal law, the Statute of the Special Court for Sierra Leone (SCSL), which was adopted in 2002, included jurisdiction over the crimes of ‘rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence’⁶¹ and ‘other inhumane acts’ as crimes against humanity.⁶² Later, the Rome Statute of the International Criminal Court (ICC) criminalized ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity’ as crimes against humanity ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’⁶³ and war crimes.⁶⁴ It also contains a category of crimes against humanity described as ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’,⁶⁵ which has proved essential in prosecuting the crime of forced marriage.

It was through the jurisprudence of international tribunals, starting with the Trial and Appeals Chambers of the SCSL, that forced marriage became recognized as a crime in its own right.⁶⁶ Forced marriage and violations against ‘bush wives’ were first prosecuted by the Trial Chamber of the SCSL by categorizing them as crimes against humanity of ‘other inhumane acts’.⁶⁷ The SCSL also found 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’ and thus constituted a war crime.⁶⁸ The SCSL Appeals Chamber established that forced marriage as found to have taken place in Sierra Leone was a separate crime against humanity as another inhumane act ‘of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’.⁶⁹ It defined forced marriage as ‘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

⁶¹ Statute of the Special Court for Sierra Leone (SCSL Statute) 2002, 2178 UNTS 138, Art. 2(g).

⁶² *Ibid.*, Art. 2(i).

⁶³ Rome Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 3, Art. 7(1)(g).

⁶⁴ *Ibid.*, Arts 8(2)(b)(xxii), 8(2)(e)(vi).

⁶⁵ *Ibid.*, Art. 7(1)(k).

⁶⁶ Bunting, “‘Forced Marriage’ in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes”, 1 *Canadian Journal of Human Rights* (2012) 165, at 167.

⁶⁷ Further Amended Consolidated Indictment, *Prosecutor v. Brima* (SCSL-2004-16-PT), 18 February 2005, para. 51–57; Corrected Amended Consolidated Indictment, *Prosecutor v. Sesay* (SCSL-04-15-PT), 2 August 2006, para. 60.

⁶⁸ Judgment, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (SCSL-04-15-T), Special Court for Sierra Leone, 2 March 2009, para. 1352.

⁶⁹ Rome Statute, *supra* note 63, Art. 7(1)(k); Appeals Judgment, *Prosecutor v. Alex Tamba Brima* (SCSL-2004-16-A), Special Court for Sierra Leone, 22 February 2008; see also Judgment, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (SCSL-04-15-T), Special Court for Sierra Leone, 2 March 2009.

with another person resulting in great suffering, or serious physical or mental injury on the part of the victim'.⁷⁰ Valerie Oosterveld has noted how the SCSL's jurisprudence has had an important and enduring impact on the understanding of forced marriage under international criminal law.⁷¹

Forced marriage was later prosecuted as an international crime in the Extraordinary Chambers in the Courts of Cambodia and before the ICC. The ICC convicted Dominic Ongwen of directly committing and being responsible for a system of 'forced exclusive conjugal partners' where women and girls were abducted as 'wives' within his brigade between 2002 and 2005 in Uganda.⁷² In *Ongwen*, the Appeals Chamber defined forced marriage as the compulsion of a person 'to enter into a conjugal union with another person by the use of physical or psychological force, or threat of force, or by taking advantage of a coercive environment'.⁷³ The definition was later endorsed in the prosecution of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, the former de facto chief of the Islamic police under armed groups Al-Qaeda in the Islamic Maghreb and Ansar Dine, for participating in a policy of forced marriages directed against women between 2012 and 2014 in Timbuktu, Mali.⁷⁴

Thus, in international criminal law, forced marriage is now considered to amount to an 'other inhumane act' separate from sexual slavery and other forms of grave sexual violence. Scholarly debates in international criminal law are divided on how forced marriage should be conceptualized, with some claiming that it should be prosecuted under the crime of enslavement,⁷⁵ whilst others argue that it should be explicitly listed as a new crime against humanity in its own right in the Rome Statute and the draft Crimes against Humanity Convention.⁷⁶

⁷⁰ Judgment, *Prosecutor v. Alex Tamba Brima* (SCSL-04-16-A), Appeals Chamber, 22 February 2008, para. 195; Judgment, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (SCSL-04-15-A), Appeals Chamber, 26 October 2009, para. 735.

⁷¹ Oosterveld, 'The Special Court for Sierra Leone: Instigating International Criminal Law's Consideration of Forced Marriage', 15 *Florida International University Law Review* (2021) 55.

⁷² Judgment, *Prosecutor v. Ongwen* (ICC-02/04-01/15), Trial Chamber IX, 4 February 2021, paras 3026, 3071, 3116.

⁷³ Judgment, *Prosecutor v. Ongwen*, (ICC-02/04-01/15 A), Appeals Chamber, 15 December 2022, para. 1024.

⁷⁴ Judgment, *Prosecutor v. Aziz* (ICC-01/12-01/18), Trial Chamber, 26 June 2024, para. 1188. However, he was acquitted of those charges. For a critique, see O'Brien, Maloney and Oosterveld, 'Forced Marriage in the Al Hassan Trial Judgment', *Opinio Juris* (23 July 2024), available at <https://opiniojuris.org/2024/07/23/forced-marriage-in-the-al-hassan-trial-judgment/>.

⁷⁵ Rome Statute, *supra* note 63, Art. 7(1)(c); Bunting, *supra* note 66.

⁷⁶ Maloney, O'Brien and Oosterveld, 'Forced Marriage as the Crime against Humanity of "Other Inhumane Acts" in the International Criminal Court's *Ongwen* Case', 23 *International Criminal Law Review* (2023) 705.

4 Reconceptualizing Forced Marriage into Armed Groups in International Refugee Law

There are, of course, different reasons for forced marriage during times of crisis or armed conflicts. Dyan Mazurana, Anastasia Marshak and Kinsey Spears explain that families may marry off young daughters to protect them from real or perceived threats of increasing sexual violence due to conflict, in order to avoid daughters being forcibly married to fighters of armed groups and to prevent recruitment into armed groups.⁷⁷ In the context of armed conflicts, early marriage may be used by families in an attempt to gain protection from armed groups and is often used to construct or consolidate family and other alliances at times of social and political unrest and breakdown.⁷⁸ In Afghanistan under the rule of the Taliban, early marriages are increasing as a strategy to protect daughters due to fears that they will be forcibly married to Taliban members.⁷⁹ Furthermore, refusing to comply with Taliban demands for marriage results in serious repercussions.⁸⁰ In yet other cases, women (and their families) may accept marriage to members of armed groups due to political ideology or social norms, only to be faced with serious harm after the marriage.

In addition to the inter-relationship between protection, family, violence and recruitment by armed groups, non-state armed groups have adopted the practice of forced marriage to further their military operations, governance strategies and political and ideological projects.⁸¹ The United Kingdom's Immigration Appeal Tribunal noted in 2004 that 'to take as a wife, by force, the wife of one's enemy, after first imprisoning him, is not an uncommon act in the course of war or other conflict, as an act of aggression against the enemy'.⁸² Broadly, Stacey Hynd explains that forced marriage is a tactic geared towards military survival and victory.⁸³ In conflict areas, controlling marriage can be another way by which armed groups assert their legitimacy in relation to existing political, religious or social authorities.⁸⁴ Oosterveld found that the commonality between forced

⁷⁷ Mazurana, Marshak and Spears, *supra* note 6, at 590.

⁷⁸ DiGiuseppe and Haer, 'The Wedding Bells of War: The Influence of Armed Conflict on Child Marriages in West Africa', 60(3) *Journal of Peace Research* (2023) 474, at 477.

⁷⁹ Safi *et al.*, Changing Social Norms around Age of Marriage in Afghanistan: Data on Repression and Resistance under the Taliban (2024), at 3, 31–32, available at <https://odi.org/en/publications/report-changing-norms-age-marriage-afghanistan>.

⁸⁰ 'The Taliban No Longer Wanted to Kill Me. Now They Wanted to Marry Me', *The Guardian* (14 August 2022), available at www.theguardian.com/global-development/2022/aug/14/taliban-female-journalist-afghan-afghanistan.

⁸¹ Donnelly and Myers, *supra* note 1, at 5.

⁸² NS (Social Group, Women, Forced Marriage) Afghanistan CG, [2004] UKIAT 00328 (30 December 2004), para. 69.

⁸³ Hynd, *supra* note 20, at 295.

⁸⁴ H. Matfess, *In Love and At War: Marriage in Non-State Armed Groups* (2024), at 3.

marriage in different conflicts is ‘the use of humans for production and/or reproduction deemed necessary during times of upheaval, often implemented through violence, including sexual violence’.⁸⁵

At the organizational level, regulating marriage has an impact on recruitment, retention, logistical capabilities and relations with the civilian population.⁸⁶ More specifically, by forcing civilian women under their control to marry fighters, armed groups can bind entire families and communities to the rebellion or to the cause they are pursuing.⁸⁷ Forced marriage into armed groups is also an effective tool in promoting recruitment, promoting fighters’ commitment to the group and thereby ensuring their retention and generally controlling their members in their areas of operations.⁸⁸ Hynd provides evidence of instrumentalization of forced marriage, and she argues that it functions as a tactic of warfare to terrorize the population, maintain discipline amongst group members and secure necessary labour and logistical support to sustain the conflict.⁸⁹ It is also a strategy to control the civilian population.⁹⁰ Overall, forced marriage into armed groups leads to instrumental gains for armed groups in regulating sex for male combatants, creating internal loyalties to the group, providing logistical support and domestic duties through forced labour, creating dependence amongst forcibly recruited girls and terrorizing the civilian population.⁹¹

Hynd notes that the tactic is particularly important for groups who are mobile and who lack strong civilian support, stable supply lines and forms of material remuneration for troops.⁹² For example, the LRA in Uganda used forced marriage as a reward to recruits for bravery and to highlight status amongst members as this was a low-cost system of remuneration.⁹³ The Revolutionary United Front (RUF) in Sierra Leone also used forced marriages in order to maintain control and hierarchy within the organization.⁹⁴ The Trial Chamber of the SCSL found that the RUF used forced marriage both as ‘a tactic of war and means of obtaining unpaid logistical support for troops’.⁹⁵

Viewed in this light, forced marriage into armed groups is akin to forced recruitment – namely, a widespread, deliberate and effective tactic to achieve armed groups’ objectives in armed conflicts. There is a strong

⁸⁵ Oosterveld, *supra* note 1, at 250.

⁸⁶ Matfess, *supra* note 84, at 3.

⁸⁷ Donnelly and Myers, *supra* note 1, at 12.

⁸⁸ Matfess, *supra* note 84, at 12.

⁸⁹ Hynd, *supra* note 20, at 298.

⁹⁰ DiGiuseppe and Haer, *supra* note 78, at 478.

⁹¹ Hynd, *supra* note 20, at 305–306.

⁹² *Ibid.*, at 306.

⁹³ Matfess, *supra* note 84, at 15.

⁹⁴ *Ibid.*, at 16.

⁹⁵ Judgment, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (SCSL-04-15-T), Special Court for Sierra Leone, 2 March 2009, para. 2107.

positive relationship between forced marriage and recruitment during armed conflict. As early marriage is often used to reduce the risk of girls being recruited by armed groups or to protect them from sexual violence, Matthew DiGiuseppe and Roos Haer found that, where armed groups use war strategies that target girls, including sexual violence and forced recruitment, the number of early marriages increased substantially.⁹⁶ Indeed, Mazurana, Marshak and Spears claim that, where girls are forced into relationships with armed group members, forced marriage overlaps with the crime of forced recruitment of children.⁹⁷ Hynd is in agreement when she notes that forced marriage in contemporary armed conflicts is closely related to the mobilization of children as combatants in African conflicts.⁹⁸ Olive Okraku and Sophie Yohani highlight how girls in Liberia, who joined one of various factions for their own protection, were later forcibly married to rebel leaders or members.⁹⁹ Once recruited in conflict situations, girls are forced to perform many essential roles for fighting groups.¹⁰⁰

Nevertheless, it is generally assumed in the field of international refugee law that armed groups forcibly recruit into their ranks for the sole or predominant purpose of providing direct support to their fighting capacity. Thus, there is a lack of recognition that forced recruitment by armed groups may be pursued for different purposes. While the UNHCR defines forced recruitment generally as ‘the coerced, compulsory or involuntary recruitment into either a state’s armed forces or a non-state armed group’,¹⁰¹ an adverse effect of combining guidance on asylum claims by deserters and persons avoiding military service with guidance on persons claiming asylum due to a fear of forced recruitment by non-state armed groups is that there is a focus on recruitment for the purpose of being directly involved in fighting in the latter.

This may be explained by the fact that states have a right in international law to require citizens to perform military service (subject to conditions of being prescribed by law, non-discrimination and non-disproportionate punishment for those who refuse).¹⁰² However, non-state armed groups do

⁹⁶ DiGiuseppe and Haer, *supra* note 78, at 484.

⁹⁷ Mazurana, Marshak and Spears, *supra* note 6, at 595.

⁹⁸ Hynd, *supra* note 20, at 292–293.

⁹⁹ Okraku and Yohani, ‘Resilience in the Face of Adversity: A Focused Ethnography of Former Girl Child Soldiers Living in Ghana’, 22 *Journal of International Migration and Integration* (2021) 809, at 813.

¹⁰⁰ Mazurana, Marshak and Spears, *supra* note 6, at 595.

¹⁰¹ UNHCR, *supra* note 40, para. 3.

¹⁰² ICCPR, *supra* note 51, Art. 8(3)(c)(ii) (which exempts from the prohibition on forced or compulsory labour (found in Art. 8(3)(a)), ‘[a]ny service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors’). In addition, Art. 2(2)(a) of the ILO Convention (No. 29) Concerning Forced or Compulsory Labour 1930, 39 UNTS 55, exempts from its prohibition on forced or compulsory labour (Art. 1(1)) ‘any work or service exacted in virtue of compulsory military service laws for work of a purely military character’.

not have the right to force or compel recruitment into their ranks in international law, even when they exercise territorial control over a part of the country.¹⁰³ Although the UNHCR recognizes that forcibly recruited children may serve different functions by noting that children are not only recruited not only to take ‘an active part in hostilities’ but also to be ‘used as spies, messengers, porters, servants, slaves [including sex slaves], and/or to lay or clear landmines’,¹⁰⁴ the UNHCR’s guidance says little about how women and girls may be recruited for roles other than armed fighting. The only reference to women in the UNHCR’s Guidelines on Military Service is in the context of the reason for persecution as a member of a particular social group. It is noted that it may be relevant in cases concerning ‘women or girls forced to act as sex slaves’, although it also states in general terms that other grounds for persecution may be relevant too.¹⁰⁵ The UNHCR’s Guidelines on Military Service are illustrative of the failure to fully reflect the various facets of the practice. The guidelines, for example, use the term ‘sexual slavery’ and talk about ‘sex slaves’ in the context of armed conflicts.¹⁰⁶ Hynd explains that forced marriage in conflict is different from forced labour and sexual slavery. She notes that the element of conjugality is essential in seeking not only to control female bodies and their reproductive labours but also to support attempts at re-ordering society.¹⁰⁷

Effectively, there is minimal guidance in international refugee law on the many intended purposes of forced recruitment by armed groups – in particular, the roles that are traditionally assigned to women and girls in conflict settings. Accordingly, despite the wealth of information showing that forced marriage into armed groups is used to promote recruitment, retention and hierarchy, to support logistics and to control the civilian population by instilling fear, and is thus an essential strategy to support armed groups’ fighting objectives, there has been no acknowledgement of this in refugee law, policy and practice. In light of the failure to acknowledge and address the more complex dynamics of forced marriage into armed groups in refugee law, policy and practice, it is perhaps unsurprising that refugee law scholarship has consistently used the term ‘forced marriage asylum claims’ to describe asylum claims relating to a fear of being exposed to this type of serious harm, which are predominantly submitted by women.¹⁰⁸ However, the term fails to reflect comprehensively the dynamics and rea-

¹⁰³ UNHCR, *supra* note 40, para. 7.

¹⁰⁴ *Ibid.*, para. 40.

¹⁰⁵ *Ibid.*, para. 59.

¹⁰⁶ *Ibid.*, paras 31, 33, 40, 59, n. 70.

¹⁰⁷ Hynd, *supra* note 20, at 300.

¹⁰⁸ Women and girls are disproportionately affected and more seriously impacted by forced marriage. Psaila *et al.*, *Forced Marriage from a Gender Perspective* (2016), available at www.europarl.europa.eu/RegData/etudes/STUD/2016/556926/IPOL_STU%282016%29556926_EN.pdf.

sons of the practice, particularly in armed conflict situations – aspects that are essential to the refugee definition.

First, conjugal associations in armed conflicts are rarely formalized in customary or civil law and thus would not constitute a marriage in the legal sense of the word. Nonetheless, the terms ‘marriage’, ‘wife’ and ‘husband’ were labels extensively used in Sierra Leone, for example.¹⁰⁹ Second, forced marriage into armed groups is often but one aspect of the treatment experienced by women and girls. For example, Boko Haram in the north-east region of Nigeria continues to abduct women and girls and is ‘subjecting them to sexual abuses, including rape, forced marriage to their captors, being sold in the market as “war booty”, forced participation in insurgent operations, including as suicide bombers, as well as to forced labour’.¹¹⁰ Forced domestic labour, such as cooking and cleaning for their ‘husbands’, is an essential element of the practice.¹¹¹ Forced marriage into armed groups is different from rape and is not a straightforward form of sexual violence.¹¹² This is because, as noted above, in addition to the associated rape and sexual violence, forced marriage in conflict is about utilizing women’s labour as a tactic of war.¹¹³ Moreover, as reflected in international criminal law, sexual violence may be an element but it is not an essential aspect of forced marriage.¹¹⁴ Third, long-term post-conflict consequences of being forcibly married are more severe for those who were married into armed groups.¹¹⁵ This is sometimes due to marriages being seen as a sign of collaboration with the opposition in post-conflict societies.¹¹⁶

The International Labour Organization and the International Organization for Migration consider that forced marriage, including in the context of armed conflicts, is a form of modern slavery defined as ‘situations of exploitation that a person cannot refuse or cannot leave because of threats, violence, coercion, deception, or abuse of power’.¹¹⁷ The conceptualization of forced marriage as a form of modern slavery is also endorsed by James Hathaway and Michelle Foster.¹¹⁸ Although the discussion above concerns

¹⁰⁹ Bunting, *supra* note 66, at 175.

¹¹⁰ European Union Agency for Asylum, Country Guidance: Nigeria (2021), at s. 2.16, available at <https://euaa.europa.eu/country-guidance-nigeria-2021/2162-violence-against-women-and-girls-boko-haram-and-treatment-post>.

¹¹¹ Anderson and Sviatschi, ‘Gender and Armed Conflict’, 40(124) *Economic Policy* (2025) 815.

¹¹² Hynd, *supra* note 20, at 298.

¹¹³ Bunting, *supra* note 66, at 174.

¹¹⁴ O’Brien, *supra* note 18, at 390; Oosterveld *et al.*, Legal Brief, ‘The Draft Crimes against Humanity Convention and Forced Marriage’ (accessed 8 April 2026), available at www.global-justicecenter.net/wp-content/uploads/2023/10/Forced-Marriage-Expert-Legal-Brief-CAH-Treaty.pdf.

¹¹⁵ Mazurana, Marshak and Spears, *supra* note 6, at 596.

¹¹⁶ Hynd, *supra* note 20, at 305.

¹¹⁷ See, e.g., ILO, *supra* note 46, at 19.

¹¹⁸ J.C. Hathaway and M. Foster, *The Law of Refugee Status* (2nd edn, 2014), at 220.

the classification of a type of asylum claim and not a legal definition, conceptualization of the practice by using suitable terminology may contribute to raising awareness of the unique characteristics of forced marriage into armed groups within international refugee law. A narrow description of forced marriage as a marriage contracted without the free and valid consent of one or both parties does not reflect the complex aspects of forced marriage into armed groups. A more encompassing category is essential for asylum decision-makers and legal representatives to acknowledge and understand the practice to its full extent.

The SCSL uses the term ‘conjugal slavery’ to describe forced marriage into armed group claims,¹¹⁹ as it includes both sexual slavery and domestic slavery.¹²⁰ The term could be adopted in international refugee law because it better reflects the range of harms and human rights violations associated with the practice, and it also emphasizes the severity of the treatment, which may not be captured by the expression ‘forced marriage’ in the same way.¹²¹ However, ‘conjugal slavery’ is still problematic because it might connote a form of harm considered to fall within the ‘private sphere’, an approach long critiqued for relegating gender-based violence asylum claims into the Refugee Convention’s particular social group reason for persecution.¹²² The argument has previously been raised that the development of a ‘gender-related asylum claims’ category in scholarship and policy has had unintended effects such as the creation of a homogenous group of types of asylum claims, conceptualized as different from ‘conventional’ asylum claims.¹²³ This categorization assigns gender-based violence claims to the Refugee Convention’s reason for persecution of a particular social group and promotes the perspective that the boundaries of international refugee law must be expanded to fit ‘gender-related asylum claims’.¹²⁴

There also appears to be a dichotomy in how scholarship, policy and practice categorize different types of asylum claims. In brief, whereas gender-based violence claims generally brought by women and girls are described by the form of harm suffered – for example, forced marriage, domestic violence, honour killing and female genital mutilation claims – other types of claims tend to be labelled by reference to the reasons for persecution, such as

¹¹⁹ Judgment, *Prosecutor v. Taylor* (SCSL-03-01-T), Trial Chamber, 18 May 2012, para. 428.

¹²⁰ Oosterveld, *supra* note 37, at 27.

¹²¹ Hilary Matfess refers to the positive connotations of marriage (‘marriage is perhaps the most universal and durable way in which love has been institutionalized and regulated’) and the ambivalent position adopted by some women forced to marry members of rebel groups. See Matfess, *supra* note 84, at 2–5. However, note that in the field of international criminal law, scholars now advocate for forced marriage to be recognized as a stand-alone crime against humanity. Oosterveld *et al.*, *supra* note 114.

¹²² See, e.g., Honkala, *supra* note 23.

¹²³ Querton, *supra* note 24, at 384.

¹²⁴ *Ibid.*

religious conversion or political opinion claims. Accordingly, categorizing these asylum claims as forced marriage into armed groups highlights the reason for persecution and may more effectively anchor the wider context and dynamics of violence in a claimant's country of origin into refugee law, policy and practice.

The lack of analysis and policy guidance on forced marriage claims outside the home and by actors of persecution other than family members in the context of contemporary armed conflicts is illustrative of the non-conventional categorization of gender-related asylum claims. Indeed, as Oosterveld has noted, the scholarship on gender-related asylum claims discusses 'female claims of female genital mutilation, forced marriage, domestic violence, "honour" crimes, rape and other forms of sexual violence, trafficking into forced prostitution or forced labour, forced sterilization or forced abortion, and transgression of social mores, or both male and female claims related to sexual orientation and gender identity'. However, it is only sexual violence aspects that tend to be situated in the context of armed conflicts.¹²⁵ Forced marriage claims are treated as private issues, even when arising in the context of armed conflict and widespread violence, which fails to properly take into account the objective conditions in the country of origin. Therefore, categorizing such asylum claims as forced marriage into armed groups claims and conceptualizing them as a form of forced recruitment helps bring these gender-based violence asylum claims out of the 'pink ghetto'.¹²⁶ The next section considers how an asylum claim based on a well-founded fear of being forcibly married to an armed group member should be assessed in international refugee law.

5 Assessing Forced Marriage into Armed Groups Asylum Claims

Considering international human rights law, international criminal law and humanitarian law, as set out above, one might think that it would be widely accepted that forced marriage is a form of harm sufficiently serious to constitute persecution in international refugee law.¹²⁷ Yet Catherine Dauvergne and Jenni Millbank have demonstrated that asylum decision-makers rarely acknowledge it as such.¹²⁸ Since their study was published, the Court of Justice of the European Union (CJEU) has provided clear precedent in this respect. The case concerned a Kurdish woman at risk of

¹²⁵ Oosterveld, *supra* note 37, at 8.

¹²⁶ Ogg, 'The Future of Feminist Engagement with Refugee Law: From the Margins to the Centre and Out of the "Pink Ghetto"?', in S.H. Rimmer and K. Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (2019) 175.

¹²⁷ See also Hathaway and Foster, *supra* note 118, at 222.

¹²⁸ Dauvergne and Millbank, *supra* note 23.

domestic violence, ‘honour killing’ and forced marriage from family members, who had fled Turkey and sought asylum in Bulgaria. The CJEU observed, in light of the Istanbul Convention, that forced marriage is a form of gender-based violence against women.¹²⁹ Thus, the CJEU concluded that this may be considered an ‘act of persecution’, as defined in the European Union Qualification Directive.¹³⁰

The notion of ‘being persecuted’ in the Refugee Convention’s definition is generally understood as ‘a sustained or systemic denial of human rights demonstrative of a failure of state protection’.¹³¹ The developing understanding of forced marriage in international human rights law, international criminal law and humanitarian law demonstrates that the mere fact of being forcibly married clearly amounts to serious harm capable of constituting persecution in international refugee law.¹³² Furthermore, there are additional human rights violations that stem from the predicament of being in a forced conjugal relationship with a member of an armed group. Such serious harm includes forced labour, forced domesticity, sexual violence and rape, forced childbearing¹³³ and rearing, restricted access to education and health, loss of freedom of movement and deprivation of liberty, amongst others. The seriousness of those violations, coupled with their repetitive nature during the course of the ‘marriage’, undoubtedly reach the threshold of persecution.

Forced marriage into armed groups directly contributes to the fighting and includes compelled support for the objectives of the armed group. Therefore, it may be conceptualized as a form of forced recruitment, which is another act of persecution. It is generally considered that forced recruitment of children under the age of 18 into the armed forces of a state or non-state group amounts to persecution *per se*.¹³⁴ Courts have also accepted that forcible recruitment attempts by non-state actors may amount to persecution¹³⁵ – in some cases, due to the deprivation of liberty¹³⁶ – and the

¹²⁹ Istanbul Convention, *supra* note 55.

¹³⁰ Case C-621/21, *WS v. Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet* (EU:C:2024:47), para. 31; Council Directive (EU) 2011/95 (recast), OJ L 337/9 (Qualification Directive). On 14 May 2024, Council Regulation (EU) 2024/1347, OJ L 2024/1347 (Qualification Regulation) was adopted. It will repeal the recast Qualification Directive by 2026, but Article 9 concerning ‘Acts of Persecution’ was not modified.

¹³¹ Hathaway and Foster, *supra* note 118, at 183.

¹³² *Ibid.*, at 222

¹³³ Including the dangers associated with becoming pregnant and giving birth (especially for young girls).

¹³⁴ Committee on the Rights of the Child, General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, UN Doc. CRC/GC/2005/6, 3 June 2005, para. 59; Hathaway and Foster, *supra* note 118, at 268; Türk and Edwards, *supra* note 42, at 170.

¹³⁵ *Dinora Del Carmen Molina v. INS*, 170 F.3d, 1247, para. 4 (1999) (US Court of Appeals 9th Cir.).

¹³⁶ See case law discussed in Hathaway and Foster, *supra* note 118, at 269.

UNHCR has endorsed this perspective.¹³⁷ Significantly, serious harm amounting to being persecuted might also arise from the consequences of refusing to enter into, or escaping from, forced marriage into an armed group. Armed groups exercise violence and issue death threats against those who refuse or escape forced marriage into their ranks.¹³⁸ Overall, therefore, being forcibly married to members of armed groups causes countless human rights violations at every stage of the practice of sufficient severity by themselves or cumulatively to constitute ‘being persecuted’ in international refugee law.

It is a widely accepted proposition in international refugee law that if the risk of serious harm is at the hands of non-state actors, such as forced marriage into armed groups, there also must be a lack of state protection for the ill-treatment to be considered persecution.¹³⁹ Hence, it is relevant to note that, in times of armed conflict, states are less likely to be able to protect women at risk of forced marriage in general but even more so forced marriage into armed groups. Gender-based violence is rarely a priority for states that struggle with weak institutions and structures as well as stretched financial means during conflict.¹⁴⁰ Accordingly, where non-state armed groups practise forced marriages between their members and women in territories that they control, it must be assumed that the state is unable to protect them.

The Refugee Convention’s definition of a refugee additionally requires that the well-founded fear of being persecuted is for reasons of race, religion, nationality, membership of a particular social group or political opinion.¹⁴¹ It is therefore necessary to establish a ‘nexus’ between the fear of being persecuted and one (or more) of the convention’s grounds. It has previously been argued that the failure to interpret the Refugee Convention’s reasons for persecution by taking into consideration the gendered nature of violence in conflict will sustain the gap in refugee protection for women fleeing armed conflicts.¹⁴² Broadly, judicial decision-making indicates that serious harm directly linked to fighting in conflict is more likely to be considered as coming within the purview of the Refugee Convention’s

¹³⁷ UNHCR, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, March 2010, para. 22.

¹³⁸ United Nations Security Council, Thirtieth Session, Doc. S/2015/203, 23 March 2015, para. 80.

¹³⁹ Hathaway and Foster, *supra* note 118, at 294; *Horvath v. Secretary of State for the Home Department*, [2001] 1 AC 489, per Lord Hope.

¹⁴⁰ Kelly, ‘Wars against Women: Sexual Violence, Sexual Politics and the Militarised State’, in R. Jacobson, S. Jacobs and J. Marchbank (eds), *States of Conflict: Gender, Violence and Resistance* (2000) 45, at 60; T. Barkawi, *Globalization and War* (2006), at xi; Querton, *supra* note 37, at 60–61.

¹⁴¹ Refugee Convention, *supra* note 8, Art. 1A(2).

¹⁴² Querton, ‘Protracted Conflicts and the Protection of Women in Refugee Law’, in R.R. Marín *et al.* (eds), *Handbook on Migration and Human Rights* (2025) 32.

definition, which is often seen as being caused by the imputation of a political opinion. More specifically, the forms of harm generally experienced by men in conflict, such as the consequences of draft evasion and forced recruitment to take a direct part in the fighting, tend to be recognized by asylum decision-makers as occurring for reasons of (imputed) political opinion leading to the granting of refugee status.¹⁴³ Indeed, the UNHCR considers that draft evasion or objection to forced recruitment by non-state armed groups may be perceived as the expression of a political opinion.¹⁴⁴

On the other hand, violence against women in conflict is often considered by asylum decision-makers to fall outside the realm of refugee protection on the basis that none of the Refugee Convention's reasons for persecution apply. Alternatively, the fear of being persecuted is seen to arise because of women's membership of a particular social group. Significantly, the gender-based violence that women face is not acknowledged to be connected with the conduct and strategic logic of armed parties in armed conflicts.¹⁴⁵ In this light, conventional cases of forced recruitment to take a direct part in the hostilities stand in contrast to forced marriage cases that are generally considered to be occurring in the private sphere.

To address this gap in international refugee law, it may be more appropriate to foreground the harms that stem from refusing to enter into a forced marriage before it takes place or escaping a forced marriage after it has taken place rather than the serious harm of the forced marriage itself. This position represents a departure from existing scholarship that is critical of asylum decision-makers' tendency not to focus on the forced marriage itself as the main source of harm.¹⁴⁶ Instead, asylum claims based on forced marriage into armed groups need to be assessed by having regard to every harmful aspect of the practice in order to demonstrate the required nexus between the serious harm and the reasons for persecution – more specifically, imputed political opinion. Forced marriage into armed groups is used widely and is usually an integral part of armed groups' combat strategy. Indeed, Donnelly and Myers found in their Forced Marriage by Non-state Armed Groups dataset that, of the armed groups that used forced marriage,

¹⁴³ See analysis of 320 asylum appeals determined in Belgium, Denmark, France, the Netherlands, Spain and the UK in Querton, *supra* note 37, at 115; Case C-238/19, *EZ v. Federal Republic of Germany* (EU:C:2020:945), para. 60. In the case of draft evaders from Syria during the Assad regime, see European Union Agency for Asylum, Country Guidance: Syria, April 2024, at 47, available at www.euaa.europa.eu/publications/country-guidance-syria. In the case of forced recruitment by the Taliban pre-2021, see European Asylum Support Office, Common Analysis and Guidance Note: Afghanistan, December 2020, at 65, available at www.euaa.europa.eu/sites/default/files/Country_Guidance_Afghanistan_2020_0.pdf.

¹⁴⁴ UNHCR, *supra* note 40, paras 52–53.

¹⁴⁵ See analysis of 320 asylum appeals determined in Belgium, Denmark, France, the Netherlands, Spain and the UK in Querton, *supra* note 37, at 115.

¹⁴⁶ See, e.g., Lawrance and Walker-Said, *supra* note 28; Dauvergne and Millbank, *supra* note 23.

almost all used forced marriage either as a policy or as a frequent practice.¹⁴⁷ Accordingly, an inter-disciplinary perspective that draws on knowledge from the political and social sciences supports an understanding of forced marriage into armed groups as a form of forced recruitment because it is being strategically deployed by armed groups to support the war effort.

Although the UNHCR notes that ‘objection to recruitment by non-state armed groups may also be an expression of political opinion’,¹⁴⁸ Hathaway and Foster consider that it is difficult to link a risk of persecution for resisting forcible recruitment into armed groups or gangs to a reason of the Refugee Convention. They highlight that the assessment by asylum decision-makers is often undertaken by reference to a dichotomy between the cause being criminal, such as an act of revenge or greed, and whether resistance is reflective of a political opinion. They conclude that, where forced recruitment is random or exclusively motivated by greed or criminal motives, then the asylum claim is appropriately refused on nexus grounds.¹⁴⁹ This dichotomous perception of violence in situations of conflict as being exercised either for criminal or political reasons is unnecessarily reductionist, however. If we examine the means and tactics of parties to a conflict, it becomes apparent that armed groups make rational choices with respect to the form of violence that they adopt. This, in turn, enables the conceptualization of particular incidents as strategic choices of violence rather than criminal byproducts of conflicts.¹⁵⁰ Examples previously cited include kidnappings, rape and sexual violence in conflict,¹⁵¹ but the rationale would apply to forced marriage into armed groups as well. Forced marriage by armed groups is not a random consequence of the breakdown of law and order during armed conflict but, rather, a concerted practice designed to support the war effort.

Hathaway and Foster recommend focusing on the question of whether the imputation of a political opinion is likely in a given societal context.¹⁵² Certainly, the notion of ‘political opinion’ is a relative concept.¹⁵³ For example, being neutral about taking sides in a conflict may be considered political.¹⁵⁴ The refusal to join an armed group or a gang may in itself – in other words, without the need to voice actual disagreement – convey opposition to the group or ‘anti-gang sentiment’, and refusal to give in to recruitment demands may be viewed as an act of betrayal.¹⁵⁵ Hathaway and Foster conclude that,

¹⁴⁷ All 72 groups but three. Donnelly and Myers, *supra* note 1, at 6.

¹⁴⁸ UNHCR, *supra* note 40, para. 53.

¹⁴⁹ Hathaway and Foster, *supra* note 118, at 419.

¹⁵⁰ Querton, *supra* note 37.

¹⁵¹ *Ibid.*, at 69.

¹⁵² Hathaway and Foster, *supra* note 118, at 420.

¹⁵³ *Ibid.*, at 413.

¹⁵⁴ *RT (Zimbabwe) & Ors v. Secretary of State for the Home Department*, [2012] UKSC 38.

¹⁵⁵ UNHCR, *supra* note 137, paras 50–51.

where refusing to join the ranks of armed groups is understood as being motivated by political objection to their cause, it would establish the existence of having a well-founded fear of being persecuted for an imputed political opinion.¹⁵⁶ It is important to remember here that the applicable Refugee Convention's reason for persecution need only be a contributing factor to the fear of being persecuted; it does not need to be the sole, or even the dominant, cause.¹⁵⁷

Where armed groups impose forced marriages, it is generally closely linked to their governance policies and the control of territory.¹⁵⁸ Forced marriage is used by armed groups as a strategic tool to ensure the recruitment and retention of new recruits, logistical support and motivation for the cause and to impact the make-up of the local population. These are all aspects of armed groups' objective of succeeding in conflict situations. Moreover, the construction of political identities in situations of armed conflict is a major driver of violence.¹⁵⁹ Furthermore, seeking state protection from being forcibly married into armed groups may be perceived by armed groups as supporting the opposing side in the conflict and thereby increasing the risk of persecution.¹⁶⁰ Accordingly, refusing to enter into, or escaping from, a forced marriage is seen as an expression of a political opinion in the context of armed conflicts where the population is divided into 'us' against 'them'.¹⁶¹ The act of refusal/escaping is seen as a rejection of the 'new' social order and/or the new governance structure being imposed in territories governed by armed groups. The UNHCR recommends that the Refugee Convention's reason of political opinion must be understood in a broad sense and that an asylum applicant's (imputed) political opinion is related to organized gangs or, in this case, armed groups.¹⁶² In this context, refusing to enter into a forced marriage before they are forcibly married or escaping a forced marriage may be considered by armed groups to be an

¹⁵⁶ Hathaway and Foster, *supra* note 118, at 420.

¹⁵⁷ UNHCR, *supra* note 137, para. 29. It is thus important to adopt an intersectional analysis of forced marriage into armed groups as the applicable Refugee Convention's reasons are likely to overlap. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color', 43 *Stanford Law Review* (1991) 1241; Pittaway and Bartolomei, 'Refugees, Race, and Gender: The Multiple Discrimination against Refugee Women', 19(6) *Refuge* (2001) 21.

¹⁵⁸ For example, by the armed groups Ansar Dine and Al-Qaeda in the Lands of the Islamic Maghreb (AQIM) in Mali. O'Brien, Maloney and Oosterveld, *supra* note 74. In the case of Al Shabaab in Somalia, see O. Stern, 'Married in the Shadows: The Wives of al-Shabaab' (2020), available at <https://orlyster.com/wp-content/uploads/2023/06/Wives-of-al-Shabaab-final.pdf>.

¹⁵⁹ M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (3rd edn, 2012).

¹⁶⁰ By analogy with asylum claims relating to victims of organized gangs, see UNHCR, *supra* note 137, para. 28.

¹⁶¹ C. Chinkin and M. Kaldor, *International Law and New Wars* (2017), at 8.

¹⁶² UNHCR, *supra* note 137, para. 45.

indication of opposition to their goals and objectives. Consequently, any potential harm resulting from the rejection of a forced marriage would be inflicted due to an imputed political opinion.

The imputation of a political opinion applies equally to the cases discussed above – namely, women who are forced to enter into a marriage with a member of an armed group or those who have managed to avoid it and those who have not (yet) personally been the subject of a forced marriage (attempt). Indeed, the fact of having been singled out by agents of persecution is not required by international refugee law to be recognized as a refugee.¹⁶³ Accordingly, an asylum claim would be well founded provided the evidence demonstrates that armed groups in the woman's country of origin rely on the practice of forced marriage into their group as a strategy of armed conflict and that there is a real risk that she would be exposed to it in light of her individual circumstances. In this latter context, refusing to enter into a forced marriage or escaping it at a later date is perceived by the armed group as the expression of an objection to their objectives in the conflict. In other words, refusing to give in to their demands is viewed by the armed group as a form of opposition to their aims. This scenario would thus also create a real risk of violence or death for reasons of imputed political opinion.¹⁶⁴

There may be cases where the tactic of forced marriage into armed groups is being adopted for other or additional reasons for persecution under the Refugee Convention, such as religion or nationality/ethnicity. Some armed groups are thus targeting women from the 'opposition' for marriages. For example, the LRA has used women to further their political goal of building a new Acholi nation,¹⁶⁵ ISIS has targeted Yezidi women (amongst others) for marriage with its fighters¹⁶⁶ and the armed Islamist groups Ansar Dine and Al-Qaeda in the Islamic Maghreb have systematically forced women to marry their fighters under a Sharia-based system.¹⁶⁷ In such cases, the forced marriage itself is imposed for a range of grounds under the Refugee Convention – namely, due to women's ethnicity, religion and/or (perceived) political opinion. Accordingly, the alternative persecution grounds of religion or nationality/race may be more straightforward to argue and generally more

¹⁶³ A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. 1 (1966), at 213.

¹⁶⁴ UNHCR, *supra* note 137, paras 46, 50–51.

¹⁶⁵ Matfess, *supra* note 84, at 13.

¹⁶⁶ Human Rights Watch, Submission to the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) of Iraq's Periodic Report for the 74th CEDAW Session (21 October – 8 November 2019) (2019), available at www.hrw.org/sites/default/files/supporting_resources/hrw_submission_cedaw_iraq.pdf; Human Rights Watch, Iraq: Forced Marriage, Conversion for Yezidis (2014), available at www.hrw.org/news/2014/10/11/iraq-forced-marriage-conversion-yezidis; Abdulkader, Young Yazidi Woman Rescued after 8 Years of Forced Marriage, Rape and Captivity at the Hands of ISIS (2022), available at www.cbsnews.com/news/yazidi-young-woman-rescued-isis-rape-captivity-al-hol-camp/.

¹⁶⁷ 'Victims of Al-Hassan Need Victim-Centred and Gender-Transformative Reparation', *Redress* (2025), available at <https://redress.org/news/victims-of-al-hassan-need-victim-centred-and-gender-transformative-reparation/>; O'Brien, Maloney and Oosterveld, *supra* note 74.

persuasive. The approach advocated for in this section is thus particularly relevant in cases of forced marriage used by armed groups in conflicts where there is no link to the religion or ethnicity of the group targeted.

6 Exclusion under International Refugee Law

The arguments presented in this article – in particular, the suggestion that forced marriage to armed group members can be viewed as a form of forced recruitment – raise another issue with significant potential consequences. Women who have been forcibly married to members of armed groups, often in the context of armed conflicts, might be considered as undeserving of refugee protection and, therefore, excludable under the Refugee Convention in the host country.¹⁶⁸ Article 1F of the Refugee Convention provides that:

this Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; or (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.¹⁶⁹

Kate Ogg notes that it is unusual for a human rights instrument to contain an exclusion clause.¹⁷⁰ Nonetheless, the provision was inspired by the prosecution of war criminals following the end of World War II, and it was adopted to exclude ‘certain persons who were deemed unworthy of international protection’.¹⁷¹ The consequences of exclusion from protection are serious, as the rights guaranteed by Articles 3–34 of the Refugee Convention are not applicable – most significantly, protection from *refoulement* under

¹⁶⁸ Thanks to Devota Nuwe (lawyer and former acting co-director, Refugee Law Project, School of Law, Makerere University, Uganda) who first raised this prospect at the Society of Legal Scholars annual conference in September 2024.

¹⁶⁹ Although the Refugee Convention, *supra* note 8, also provides for exemptions to the prohibition of expulsion ‘on grounds of national security or public order’ (Art. 32(1)) and to the prohibition of *refoulement* in respect of a refugee whom ‘there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’ (Art. 33(2)), they are less likely to apply to this type of cases because the women’s role was limited to past actions which they were compelled to perform as ‘wives’ of armed group members and therefore cannot be considered a current danger to the security of the host country. Arts. 32(1) and 33(2) Refugee Convention are thus not further discussed in this article.

¹⁷⁰ Ogg, ‘Separating the Persecutors from the Persecuted: A Feminist and Comparative Examination of Exclusion from the Refugee Regime’, 26 *JRL* (2014) 82, at 85.

¹⁷¹ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/1P/4/Eng/REV.2 (1979, reissued 2019), paras 147–148.

Article 33(1).¹⁷² The following discussion considers whether there could be serious reasons for considering that women forcibly married to members of armed groups have committed crimes against humanity if we view their forcible marriage as a form of forced recruitment, as argued in this article.¹⁷³ It concludes that women with such past experiences should not fall within the ambit of the exclusion clause because they have not voluntarily joined the armed group, and their roles as ‘wives’ do not provide a significant, if any, contribution to the commission of crimes.

Significantly, scholars have argued that the Refugee Convention’s exclusion provision should be interpreted narrowly in light of its humanitarian context.¹⁷⁴ The UNHCR’s handbook states that, ‘due to their nature and the serious consequences of their application to a person in fear of persecution, the exclusion clauses should be applied in a restrictive manner’.¹⁷⁵ Moreover, the UNHCR and scholars have called for a balancing exercise to be applied between the nature of the crimes and the treatment that the applicant fears on return to their country of origin,¹⁷⁶ although state practice and the CJEU do not consistently support such an approach.¹⁷⁷ As the Michigan Guidelines on Exclusion note, exclusion decisions are binary and, thus, stricter than liability under international criminal law, which is followed by mitigation at sentencing.¹⁷⁸ Finally, Jennifer Bond highlights that the ‘punishment’ of being excluded from refugee protection is particularly stark for those guilty of crimes through aiding and abetting compared to those who have directly committed the crimes in question.¹⁷⁹

¹⁷² Gilbert and Bentajou, ‘Exclusion’, in C. Costello, M. Foster and J. McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 711, at 714.

¹⁷³ In the USA, for example, women have been excluded from asylum or resettlement under anti-terrorism legislation on the basis they provided material support to armed groups in the form of food, health care and shelter. Pasquarella, ‘Victims of Terror Stopped at the Gate to Safety: The Impact of the “Material Support to Terrorism” Bar on Refugees’, 13(3) *Human Rights Brief* (2006) 28.

¹⁷⁴ Gilbert and Bentajou, *supra* note 172, at 714. The Michigan Guidelines suggest the exclusion clauses should be applied ‘with caution’. Hathaway *et al.*, ‘The Michigan Guidelines on the Exclusion of International Criminals’, 35 *Michigan Journal of International Law* (2013), at 3, para. 1.

¹⁷⁵ UNHCR, *supra* note 171, para. 180, see also para. 149; see also UNHCR, Guidelines on International Protection no. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, Doc. HCR/GIP/03/05, 4 September 2003, para. 2.

¹⁷⁶ UNHCR, Guidelines on International Protection no. 5, *supra* note 175, para. 24; Gilbert, ‘Exclusion Is Not Just About Saying “No”: Taking Exclusion Seriously in Complex Conflicts’, in D.J. Cantor and J.F. Durieux (eds), *Refugee from Inhumanity: War Refugees and International Humanitarian Law* (2014) 155.

¹⁷⁷ Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D* (EU:C:2010:661), para. 111; Gilbert and Bentajou, *supra* note 172, at 722.

¹⁷⁸ Hathaway *et al.*, *supra* note 174, para. 3.

¹⁷⁹ Bond, ‘Excluding Justice: The Dangerous Intersections between Refugee Claims, Criminal Law, and “Guilty” Asylum Seekers’, 24 *IJRL* (2012) 37.

The relevant international instruments that now guide the interpretation of Article 1F are Articles 6–8bis of the Rome Statute of the ICC, which define genocide, crimes against humanity, war crimes and the crime of aggression respectively.¹⁸⁰ The Rome Statute provides that a person will have criminal responsibility if they aid, abet or otherwise assist in the (attempted) commission of a crime covered by the Rome Statute with the intention of facilitating the commission of such a crime.¹⁸¹ Additionally, criminal responsibility may arise where a person contributes to the (attempted) commission of such a crime by a group of persons acting with a common purpose if such contribution is intentional and furthers the criminal activity or purpose of the group or if it is made in the knowledge of the group's intention.¹⁸²

Whereas the exclusion provisions clearly include direct perpetration of crimes against humanity, international refugee law provides that mere membership in a group is insufficient to attribute responsibility for the crime(s)¹⁸³ and that a decision to exclude must include an individual assessment of the specific facts of the case.¹⁸⁴ The CJEU noted that, where a person was a member of a terrorist organization, it is necessary to attribute to the person 'a share of the responsibility for the acts committed by the organisation in question while that person was a member', even when that person has actively supported the armed struggle waged by that organization.¹⁸⁵ Individual responsibility can only be determined by assessing 'the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct'.¹⁸⁶ Lord Brown in the UK Supreme Court established that a person could be excluded under the Refugee Convention 'if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose'.¹⁸⁷ The UNHCR's guidelines adopt a similar approach requiring the existence of a substantial contribution to the commission of the crime to demonstrate individual responsibility.¹⁸⁸

¹⁸⁰ In accordance with the general rule of interpretation under the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 31(3)(c). Gilbert and Bentajou, *supra* note 172, at 715.

¹⁸¹ Rome Statute, *supra* note 63, Art. 25(3)(c).

¹⁸² *Ibid.*, Art. 25(3)(d).

¹⁸³ Joined Cases C-57/09 and C-101/09, *supra* note 177, paras 88–89; *J.S. (Sri Lanka), R. (on the application of) v. Secretary of State for the Home Department (rev 1)*, [2010] UKSC 15, paras 38, 49.

¹⁸⁴ Joined Cases C-57/09 and C-101/09, *supra* note 177, para. 91.

¹⁸⁵ *Ibid.*, para. 95.

¹⁸⁶ *Ibid.*, para. 97.

¹⁸⁷ *J.S. (Sri Lanka)*, *supra* note 183, para. 38.

¹⁸⁸ UNHCR, Guidelines on International Protection no. 5, *supra* note 175, para. 18.

The Rome Statute further establishes that a person is criminally responsible if the elements of the crime are committed with intent and knowledge.¹⁸⁹ The UNHCR considers that intent (*mens rea*) is a necessary element for individual responsibility in international refugee law.¹⁹⁰ Ogg argues that ‘those who are victims of human rights violations may, in some circumstances, lack moral culpability for the commission of excludable crimes’.¹⁹¹ Furthermore, Matthew Happold has argued that child soldiers should be able to rely on infancy as a defence to exclusion – in other words, a lack of intent is presumed in children’s cases because they lack the level of mental and moral development required to fully understand the consequences of their actions.¹⁹² In relation to crimes against humanity, the Rome Statute also requires that the crime(s) be part of a widespread or systematic attack on a civilian population committed with knowledge of the attack.¹⁹³

The UNHCR calls for relevant defences to criminal responsibility to be applicable and notes that, ‘as for duress, this applies where the act in question results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him- or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided’.¹⁹⁴ The defence of duress should be carefully considered for minors who may be particularly vulnerable.¹⁹⁵ Ogg is very critical of using international criminal law norms to interpret the refugee law exclusion clauses. Although international criminal law seems to offer principled standards to evaluate the need to exclude a person from refugee protection, the strict legal framework of duress ‘obscures the evidence about the circumstances that led to the crime and does not help to achieve full assessment of all the circumstances’. These circumstances are particularly relevant in the cases of women who have participated in excludable crimes as a result of threats of (sexual) violence.¹⁹⁶

Aiding and abetting crimes against humanity would trigger the exclusion provision, but this form of involvement requires voluntary participation, significant contribution and knowledge of the crime. In the same way as the inter-disciplinary literature discussed above is relevant to adequately determine the inclusion of women fearing forced marriage into armed

¹⁸⁹ Rome Statute, *supra* note 63, Art. 30.

¹⁹⁰ UNHCR, Guidelines on International Protection no. 5, *supra* note 175, para. 21.

¹⁹¹ Ogg, *supra* note 170, at 109.

¹⁹² Happold, ‘Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention’, *American University International Law Review* (2002) 1131, at 1162.

¹⁹³ Rome Statute, *supra* note 63, Art. 7(1).

¹⁹⁴ UNHCR, Guidelines on International Protection no. 5, *supra* note 175, para. 22.

¹⁹⁵ UNHCR, Guidelines on International Protection no. 5, *supra* note 175, para. 28; Happold, *supra* note 192, at 1158–1172.

¹⁹⁶ Ogg, *supra* note 170, at 98.

groups in situations of armed conflict under Article 1A(2) of the Refugee Convention, corresponding knowledge regarding the practice provides relevant indicators of whether women forcibly married to fighters could be considered to have committed, aided, abetted or otherwise assisted in the commission of war crimes, crimes against humanity, a serious non-political crime or acts contrary to the purposes and principles of the UN.

Knowledge acquired in the fields of political and social sciences indicates that such women do not become part of armed groups voluntarily and that they have no influence on the conduct of hostilities or the commission of international crimes.¹⁹⁷ Forced marriage into armed groups occurs in the context of widespread violence, whereby marriages are enabled by a coercive environment.¹⁹⁸ Moreover, their roles tend to be limited to providing logistical support to the group. Women forcibly married into armed groups tend to play a more intangible function in the conflict by being used to promote recruitment, retention and discipline and becoming an illustration of the 'ideal community' to populate the disputed territory following the end of the conflict.¹⁹⁹ Accordingly, women forcibly married into armed groups should not be viewed as perpetrators. Applying the exclusion clause(s) against persons who are themselves victims of crimes against humanity would be contrary to the fundamental object and purpose of Article 1F of the Refugee Convention, which is to exclude persons whose 'admission as a refugee threatens the integrity of the international refugee regime'.²⁰⁰ Overall, therefore, viewing the forced marriage of women to fighters of armed groups as a form of forced recruitment should not trigger the exclusion provisions in international refugee law.

7 Conclusion

The practice of forced marriage has been relegated to the category of gender-related asylum claims in international refugee law such that its structural contours have been rendered invisible. In particular, refugee law scholarship and policy have failed to acknowledge, address and respond to the serious harm caused by forced marriage into armed groups. The gap is significant, as the dataset collated by Donnelly and Myers reveals how forced marriage into armed groups is a human rights violation of choice for many non-state armed groups across all geographical regions. Yet, despite forced marriage being a practice as prevalent as sexual violence by armed

¹⁹⁷ Mazurana, Marshak and Spears, *supra* note 6; Hynd, *supra* note 20.

¹⁹⁸ A coercive environment includes, amongst other factors, 'the military presence of hostile forces amongst the civilian population, the commission of other international crimes, the existence of armed conflict, and the vulnerability of victims'. See analysis in O'Brien, Maloney and Oosterveld, *supra* note 74.

¹⁹⁹ Matfess, *supra* note 84; Donnelly and Myers, *supra* note 1.

²⁰⁰ Hathaway *et al.*, *supra* note 174, para. 4.

groups in conflicts, debates by refugee law scholars on the protection needs of persons fleeing gender-based violence in conflict have centred on the latter. This article therefore fills a gap in knowledge of relevance to a potentially large number of asylum claims. Of course, as states do not collect statistics on the underlying basis for asylum applications, the exact number cannot be ascertained. However, as argued in this article, it is likely that such claims would have been presented by legal representatives and determined by asylum decision-makers as forced marriage asylum claims rather than as forced marriage into armed groups asylum claims. In the latter cases, the coercive environment and the strategies of armed groups pursued through the practice of forced marriages would have been glossed over. This highlights the need for reconceptualizing forced marriage into armed groups claims as a distinct category of asylum claims that may be considered as a form of forced recruitment by non-state armed groups.

The article then discussed how the Refugee Convention's definition might be interpreted to better respond to forced marriage into armed groups asylum claims. It has demonstrated how forced marriage itself, the human rights violations associated with the practice and the consequences of rejecting or escaping forced marriage to armed group fighters constitute persecution. The case was made for a presumption of the lack of state protection where armed groups rely on the practice in territories they control. Finally, information on why armed groups widely resort to the practice of forced marriage in times of conflict demonstrates how the persecution feared is for reasons of imputed political opinion. The article finished by considering whether women forced to marry armed group fighters might be excluded from protection under the Refugee Convention.

The analysis demonstrates the need for revised guidance in this area in order to highlight the prevalence of the practice, bring it into the realm of 'conventional' asylum claims, emphasize the nexus to the ground of imputed political opinion and address any concerns regarding potentially detrimental consequences of association with non-state armed groups. In particular, the UNHCR's Guidelines on Armed Conflict²⁰¹ and the Guidelines on Military Service²⁰² should better reflect the nature of the harm surrounding forced marriage into armed groups, the coercive environment in which it takes place and the purpose for which it is adopted. In addition, lawyers and legal representatives should ensure relevant evidence of the country situation is provided to demonstrate those aspects. It is hoped that the discussion in this article has provided some initial suggestions for these purposes.

²⁰¹ UNHCR, *supra* note 43,

²⁰² UNHCR, *supra* note 40.