

WHAT IS FORCED MARRIAGE? TOWARDS A DEFINITION OF FORCED MARRIAGE AS A CRIME AGAINST HUMANITY

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The Special Court for Sierra Leone's Trial and Appeals Chambers handed down judgments considering, for the first time, forced marriage as a crime against humanity.¹ This Article critiques those decisions against the Appeals Chamber's stated aim of "enriching the jurisprudence of international criminal law."² This Article argues that there is a need to recognize a crime of forced marriage, but in order to enrich current jurisprudence, it should be limited to only the conferral of the status of marriage and the ongoing effects of that status on the victim. Other crimes that occur within the marriages should not be collapsed into the prosecution of forced marriage; they are separate offenses that need separate recognition. Two contrasting examples of forced marriage are compared: so-called "forced marriages" in a number of African conflicts involving the abduction of women and girls by rebels and forced marriage between 1975 and 1979 in Khmer Rouge-ruled Cambodia. The African examples are drawn from published research, while a portrait of forced marriage in Cambodia is sketched through stories gathered in field research conducted in Cambodia in 2006, along with some published material. This Article argues that there is a lacuna in the law that requires the recognition of

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¹ Prosecutor v. Brima, Kamara, & Kanu, Case No. SCSL-04-16-T, Trial Chamber II, ¶ 713 (June 20, 2007), available at <http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/TrialChamberJudgment/tabid/173/Default.aspx> [hereinafter *AFRC Trial Chamber Decision*] and Prosecutor v. Brima, Kamara, & Kanu, Case No. SCSL-04-16-A, Appeals Chamber Judgment, ¶¶ 175–203 (Feb. 22, 2008), available at <http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/AppealJudgment/tabid/216/Default.aspx> (follow "File 1" and "File 2") [hereinafter *AFRC Appeals Chamber Decision*].

² *AFRC Appeals Chamber Decision*, at ¶ 181.

*forced marriage as a crime. The Extraordinary Chambers in the Courts of Cambodia (the "ECCC"), established to try Khmer Rouge crimes, has the opportunity to address this crime and to create a record of the fact that forced marriages were traumatic events that deeply affected thousands of Cambodian lives.*³

INTRODUCTION

*My husband was a French soldier. They hanged my husband. Five months later they told me I had to marry but I refused. They took me to the forest and raped me. After they raped me I said to them, "kill me" . . . I said, "six of my children have already died so please dig a hole and bury me together with my four remaining children" but I won't agree to marry . . . Now I am almost mad.*⁴

In 2005, the Special Court for Sierra Leone (SC-SL)⁵ broke new ground when it recognized that forced marriage could constitute an inhumane act and allowed the Prosecutor to amend the indictment for three accused to include the charge of forced marriage as a crime against humanity.⁶ At trial, however, the majority dismissed the charge for

³ Law on the Establishment of the Extraordinary Chambers, NS/RKM/1004/006, with inclusion of amendments as promulgated on Oct. 27, 2004, *available at* http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

⁴ Interview with April 17 Woman, in Cambodia (July 26, 2006).

⁵ The SC-SL was established by the United Nations and the Government of Sierra Leone to try those bearing the greatest responsibility for serious violations of international humanitarian law that have occurred within Sierra Leone's territory since November 30, 1996. For further information regarding the SC-SL, see generally The Special Court for Sierra Leone, <http://www.sc-sl.org> (last visited April. 1, 2010).

⁶ See *Prosecutor v. Brima*, Case No. SCSL-2004-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment, (May 6, 2004), *available at* <http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/TrialChamberDecisions/tabid/157/Default.aspx> (follow "SCSL-04-16-PT-070-5330-5344"; for dissenting opinion, follow "SCSL-04-16-PT-070-5330-5344"); see also Press Release, Special Court for Sierra Leone, The Office of the Prosecutor, Prosecutor Welcomes Arraignment of RUF and AFRC Indictes on Charges Related to Forced Marriage (May 17, 2004), *available at* <http://www.sc-sl.org/PRESSROOM/OTPPressReleases/tabid/196/Default.aspx> (follow "Prosecutor Welcomes Arraignment of RUF and AFRC Indictes on Charges Related to Forced Marriage"); Press Release, Special Court for Sierra Leone, The Office of the Prosecutor, Statement of the Prosecutor on International Women's Day (Mar. 8, 2005), *available at* <http://www.sc-sl.org/PRESSROOM/OTPPressReleases/tabid/196/Default.aspx> (follow "Statement of the Prosecutor on International Women's Day").

redundancy, holding that the prosecutor's evidence indicated that the crime of forced marriage was completely subsumed by the crime of sexual slavery.⁷ In 2008 the Appeals Chamber reversed that finding and convicted the three accused of forced marriage for a distinct inhumane act that constituted a crime against humanity.⁸ Forced marriage is not unique to Sierra Leone. Stories have emerged from other conflicts in Africa, including Rwanda, Mozambique, and Uganda, in which women were taken as "wives" or "bush wives" by the armed forces.⁹

A contrast to these examples is the policy of forced marriage introduced by the Khmer Rouge,¹⁰ which ruled Cambodia between 1975 and 1979. While stories of forced labor, starvation, executions, and the "killing fields" have been etched into the international community's imagination, the story of gender violence has remained largely untold.¹¹ The prosecutions currently being undertaken in the ECCC, established to prosecute Khmer Rouge crimes,¹² present an opportunity for recognizing and addressing gender violence. The study on which this Article is partly based was funded with the hope that evidence of gender violence could be

⁷ *AFRC Trial Chamber Decision*, at ¶ 713.

⁸ *AFRC Appeals Chamber Decision*, at ¶¶ 175-203.

⁹ See *infra* note 77.

¹⁰ The Khmer Rouge is the popular name for the party officially known as the Communist Party of Kampuchea (CPK).

¹¹ For research that focuses on gender violence perpetrated by the Khmer Rouge, see generally Katrina Anderson, *Gender and Transitional Justice: Turning Reconciliation on Its Head: Responding to Sexual Violence Under the Khmer Rouge*, 3 SEATTLE J. SOC. JUST. 785 (2005); Patrick Heuveline & Bunnak Poch, *Do Marriages Forget their Past? Marital Stability in Post-Khmer Rouge Cambodia*, DEMOGRAPHY, Feb. 2006, at 99; Kalyanee Mam, *Koh Khsach Chunlea: An Island of Widows Documentation Center of Cambodia*, DOCUMENTATION CENTER OF CAMBODIA, Mar. 30, 2006, www.dccam.org/Survivors/21.htm; Kalyanee Mam, *The Endurance of the Cambodian Family Under the Khmer Rouge Regime: An Oral History*, in GENOCIDE IN CAMBODIA AND RWANDA: NEW PERSPECTIVES 119-62 (Susan E. Cook ed., 2006). Other works on the Khmer Rouge include analysis of gender violence; see, e.g., ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION* (1998).

¹² The ECCC is a hybrid tribunal between the Government of Cambodia and the United Nations. It is the result of painstaking negotiations over many years. For further information about the ECCC, see generally Extraordinary Chambers in the Courts of Cambodia, <http://www.eccc.gov.kh/>; see also Open Society Justice Initiative, *The Extraordinary Chambers*, JUSTICE INITIATIVES, http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/justice_20060421/jinitia tives_200604.pdf (last accessed Jan. 16, 2010).

brought before the ECCC, which began operating in Phnom Penh in 2006. Bringing gender crimes before the ECCC would contribute to the international feminist project of increasing recognition of gender crimes in international law.¹³ This hope was tempered by the belief that people in Cambodia would be unwilling to talk about these crimes, particularly rape. The study involved in-depth interviews with over one hundred victims or eyewitnesses of sexual violence in Democratic Kampuchea who were identified through a survey of more than 1,500 Cambodians (“the Study”).¹⁴ The interviewees—both men and women, civilians and cadre—told of their diverse experiences during the regime. One recurring tale was of men and women being coerced into marriages with a spouse chosen for them by the Khmer Rouge. Although they were unwilling participants, they felt unable to resist, either because of direct violence or out of fear of the oppressive regime. Many still remain in these forced marriages some thirty years after

¹³ For discussions of the project, including criticism, see Janet Halley, Prabha Kotiswaran, Hila Shamir, & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006); Katherine Franke, *Gendered Subjects of Transitional Justice*, 15 COLUM. J. GENDER & L. 813 (2006); Karen Engle, *Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 778 (2005).

¹⁴ The initial survey was conducted by Cambodian Defenders Project’s (CDP) network of “domestic violence sentinels.” The sentinels are a group of ten people in each province who have been identified by the Ministry of Women’s Affairs and trained by the Women’s Resources Center (WRC), a unit of CDP. WRC trains the sentinels to act as contact points in the community for women suffering domestic and sexualized violence. Ten sentinels in five provinces conducted the initial survey of 1,500 Cambodians over the age of forty-three years (men and women) who were living in Cambodia between 1975 and 1979. The survey was semi-random, though some sentinels were aware of people who had suffered forced marriage or sexualized violence and approached them. The survey asked basic data questions and questions about forced marriage, Khmer Rouge sexual policy, forced prostitution, forced nudity, rape, forced pregnancy, sexual mutilation, and sexualized violence in prison. The survey asked whether the informants had witnessed or personally experienced any of these offenses. I employed Cambodian law students to translate the survey results and then selected approximately twenty interviewees in each of the five provinces surveyed for in depth interviews. The 102 interviews (twenty-nine males and seventy-three females) were conducted in Khmer with translation to English. Some of the interviews were conducted by Kasumi Nakagawa, either under my supervision or without supervision, and some interviews with male informants were conducted by Julien Rouyerre with a male translator. The interviews were all taped and then transcribed by the Cambodian law students. The translation of excerpts quoted in this article was confirmed by a second translator. In light of the sensitive nature of the topics discussed, I have elected to omit the names of the interviewees. Instead, they are differentiated by their status under the Khmer regime (generally either a “base” person, a peasant, an “April 17” person, or a former city-dweller) and the date on which they were interviewed.

the fall of the regime and continue to feel anger and resentment at being forced to marry. The Study provided an opportunity to test the universality of the SC-SL's decision against a contrasting factual matrix.

The SC-SL's decision and forced marriage during periods of conflict has been the subject of some recent discussion, both academically and in the non-governmental sector.¹⁵ Much of this literature has championed the recognition of forced marriage as a crime against humanity. This article questions whether there is a lacuna in the law that requires recognition of a separate offense of forced marriage. If such a lacuna does exist, then how can the crime of forced marriage be defined to ensure it advances the protection of civilians and the recognition of gender based crimes, rather than further entrenching patriarchal ideas of marriage?

Part I examines the nature of forced marriages in Democratic Kampuchea using the stories collected in interviews along with other authors' analysis. While each Cambodian's experience of the Khmer Rouge is unique, similarities in various stories sketch a portrait of forced marriage under the Khmer Rouge. Forced marriage under the Khmer Rouge was a crime perpetrated by an outsider to the marriage, where the oppressive regime forced both men and women into a lifelong relationship to which they did not consent. The stories of how these individuals were coerced and the effect that has had on them is told through their own words.

Part II outlines the different factual matrix of forced marriage in African conflicts. In these conflicts girls and women were more commonly the victims of forced marriage, and their "husbands," members of the armed forces in the conflict, were the perpetrators.

Part III then analyzes the decisions of the SC-SL Trial and Appeals Chambers regarding forced marriage. It critiques the decisions against the Appeals Chamber's stated aim of "enriching the jurisprudence of international criminal law."¹⁶ It argues that the suffering of women subjected to forced marriage is qualitatively different from those not labelled "wife" and that there is a lacuna in the law that a crime of forced marriage can address.

¹⁵ Neha Jain, *Forced Marriage as Crime against Humanity: Problems of Definition and Prosecution*, 6 J. INT. CRIM. JUST. 1013 (2008); Cecily Rose, *Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-based Crimes*, 7 J. INT. CRIM. JUST. 353 (2009); Micaela Frulli, *Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a "New" Crime against Humanity*, 6 J. INT. CRIM. JUST. 1033 (2008); CHRISTOPHER CARLSON & DYAN MAZURANA, FEINSTEIN INT'L CTR., FORCED MARRIAGE WITHIN THE LORD'S RESISTANCE ARMY, UGANDA (May 2008).

¹⁶ *AFRC Appeals Chamber Decision*, at ¶ 181.

Part IV sets out the argument that while there is a need to recognize a crime of forced marriage, the crime must be limited only to the conferral of the status of marriage and the ongoing effects of that status on the victim whether they are male or female. Despite the enthusiasm for what appears on its face to be a gain in women's rights, the potential effects of expanding the crime of forced marriage beyond the "marriage itself" needs closer examination. If the crime encompasses other conduct within these "marriages"—for example, rape, slavery, or torture—the jurisprudence will not be enriched but will instead serve the perpetrator's aim of veiling criminal conduct with the term "marriage."

I. FORCED MARRIAGE IN DEMOCRATIC KAMPUCHEA

A. The Policy

The Khmer Rouge destroyed both the traditional family life of subsistence agriculture and the modern city life that Cambodians had begun to adopt by 1975. The Khmer Rouge regime abolished money and private property and rapidly introduced communal agriculture, reorganizing the population into agricultural cooperatives in which they forced people to live and work.¹⁷ They immediately evacuated the cities. Urban dwellers, whose education and way of life the Government believed made them enemies of the revolution, were sent out into the countryside. These people were labelled "April 17" or the "new people" (*neak thmey*), those who had not embraced the revolution before April 17, 1975. This distinguished them from the "base people" (*neak moultanh*), peasants who had lived under Khmer Rouge control during the civil war of 1970-1975 and who were supposed to be the beneficiaries of the new society.¹⁸

¹⁷ Agricultural cooperatives were the smallest unit of administration. The country was divided into zones, which in turn were divided into sectors, lay districts, sub-districts, and then into cooperatives. Group of Experts for Cambodia, *Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135*, ¶ 17, U.N. Doc A/53/850 (Feb. 18, 1999).

¹⁸ Many authors have examined the history of Democratic Kampuchea from both a personal and academic perspective. For academic consideration, see, e.g., DAVID CHANDLER, *BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY* (1999); DAVID CHANDLER, *VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON* (1999); BEN KIERNAN, *THE POL POT REGIME: RACE, POWER AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975–79* (2d ed. 2002); FRANCOIS PONCHAUD, *CAMBODIA YEAR ZERO* (Nancy Amphoux trans., Holt, Reinhart & Winston 1978) (1977); MICHAEL VICKERY, *CAMBODIA: 1975–1982* (1984); BECKER, *supra* note 11; TOM FAWTHROP & HELEN JARVIS, *GETTING AWAY WITH GENOCIDE: ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL* (2004). For personal accounts, see, e.g., *CHILDREN OF CAMBODIA'S KILLING FIELDS: MEMOIRS BY SURVIVORS* (Dith Pran ed., 1999);

To counter the threat posed by “class enemies,” the Khmer Rouge reached into every aspect of the people’s existence, attempting to abolish all pre-existing economic, social, and cultural institutions.¹⁹ The people knew the government only through its manifestation as *Angkar* (the Organization), and the punishments for disobeying the *Angkar* could be severe: beatings, hard labor, imprisonment, torture, and execution.

This radical reordering of social and cultural institutions included fracturing the institution of family.²⁰ Family groups were broken up as people were made to live and work with others of their own sex and age. Children were separated from their parents. The *Angkar* controlled women’s and men’s sexuality and relationships, forbidding any pre-marital or extra-marital contact with the opposite sex.²¹ The Khmer Rouge believed that sexual relationships would distract people from work and therefore undermine the success of the revolution: “. . . they thought sex should be restricted because it took up too much time and detracted from the chores at hand, overnight industrialization and glorification of the motherland.”²² As one propaganda slogan put it, “physical beauty will hinder the struggle.”²³ Reproduction, however, had to continue as the Khmer Rouge aimed to increase the population and required productive labor to sustain the agrarian revolution.²⁴ At the same time, given the restrictions on sexual

LUONG UNG, *FIRST THEY KILLED MY FATHER: A DAUGHTER OF CAMBODIA REMEMBERS* (2006); CHANRITHY HIM, *WHEN BROKEN GLASS FLOATS: GROWING UP UNDER THE KHMER ROUGE* (2001); PIN YATHAY WITH JOHN MAN, *STAY ALIVE, MY SON* (Cornell University Press 2000) (1987).

¹⁹ *Report of the Group of Experts for Cambodia*, *supra* note 17, at ¶ 16. For detailed discussion of the Khmer Rouge attack on the family and resistance to the attack, see Mam, *supra* note 7, at 119–62.

²⁰ For detailed discussion of the Khmer Rouge attack on the family and resistance to the attack, see Mam, *supra* note 11, at 119–62.

²¹ BECKER, *supra* note 11.

²² *Id.* at 224.

²³ HENRI LOCARD, *POL POT’S LITTLE RED BOOK: THE SAYINGS OF ANGKAR* 264–266 (2004).

²⁴ MICHAEL VICKERY, *CAMBODIA: 1975–1982*, 174 (1984). Pol Pot said: “[O]ur policy to increase our population is recording good initial success. From mid-1977 to mid-1978 there were 392,000 births out of a population of 7,800,000. . . . The rate of our population growth has surpassed that of the precoup period We must thus pay great attention to raising and improving the living conditions of our people and constantly bettering their health so as to accelerate the growth of our population.” *Id.* at n.373.

relationships, reproduction could only take place within marriage. Marriages had traditionally been arranged through families, but, as love and family had no place in Democratic Kampuchea, the *Angkar* usurped the role of the family in selecting spouses. Like resistance to other policies of the regime, punishment for refusal could be severe.²⁵

The field research on which this Article is based did not attempt a quantitative analysis of the prevalence of forced marriage. Patrick Heuveline and Bunnak Poch, in what they believed to be “the first quantitative evidence on marriage under the KR,”²⁶ found that 23.9% of women married between 1975 and 1979 were forced to marry by someone other than their families. Their research was not targeted at establishing rates of forced marriage under the Khmer Rouge, but they compared this figure to pre-1975 data that showed only 1.36% of women were forced to marry by someone other than their families.²⁷ They concluded that “overall, the qualitative and quantitative data at hand strongly support the claim that marriages were contracted very differently during the KR than in other periods.”²⁸

Heuveline and Poch’s conclusion understates the difference between pre-Khmer Rouge marriage and marriage arranged by the *Angkar*. As one interviewee said, marriages in Democratic Kampuchea “had nothing to do with Cambodian tradition.”²⁹

B. The Ceremonies

In pre-Khmer Rouge Cambodia, marriages were commonly contracted under the long-established tradition of arranged marriage. A young man or his family could approach a young woman’s family to ask for her hand in marriage. The parents would then investigate the background of the prospective husband:

Parents also try to assess the compatibility of the potential spouses, in particular by consulting an *achar*, an elderly religious man who bases his evaluation on the astrological combination of

²⁵ See discussion *infra* Part II.C.

²⁶ Heuveline & Poch, *supra* note 11, at 102.

²⁷ *Id.* at 110.

²⁸ *Id.*

²⁹ Interview with April 17 Woman, in Cambodia (July 6, 2006).

the bride's and groom's respective birth timing. Parents are discouraged, however, from marrying a daughter against her will.³⁰

Parental involvement in marriages was included in the Civil Code that operated prior to 1975. The Code required both minor and adult children to seek the permission of their parents for the match, though it allowed adult children to marry without parental consent.³¹ May Ebihara, in her study of a 1960s Cambodian village, observed that it is the parents who decide on the marriage and "the child acquiesces because of a sense of obedience or because she/he has no strong feelings about marrying a particular person."³² The system of arranged marriage is, of course, open to abuse, and doubtless some of these marriages were without one or both of the spouses' freely given consent. For example, a rape victim could be forced to marry her rapist, as she could no longer marry another man because she had lost her virginity.³³ The Civil Code did contain provisions that allowed either the man or woman to break off an engagement and allowed either spouse, once married, to annul the marriage if their consent was vitiated by mistake or coercion.³⁴ The basic institution therefore envisioned consensual arranged marriage. Marriage ceremonies were elaborate, with rituals involving the bride and groom and their families.³⁵

Rather than following the tradition of consultation, consent, and celebration the Khmer Rouge simply forced couples to marry each other. As one respondent explained:

³⁰ Heuveline & Poch, *supra* note 11, at 101 (citing ROBERT LINGAT, *LES REGIMES MATRIMONIAUX DU SUD-EST DE L'ASIE: ESSAI DE DROIT COMPARE INDOCHINOIS*, (1952)).

³¹ CIVIL CODE [C. CIV.] art. 125–136 (Cambodia), Julian Rouyrre trans. (copy on file with the author).

³² May Mayko Ebihara, Svay, A Khmer Village in Cambodia 468 (1968) (unpublished Ph.D. dissertation, Columbia University) (*available at* <http://proquest.umi.com/pqdlink?did=759562641&Fmt=7&clientId=15403&RQT=309&VName=PQD>).

³³ Rebecca Surtees, *Rape and Sexual Transgression in Cambodia*, in *GENDER INEQUALITY AND TECHNOLOGIES OF VIOLENCE: VIOLENCE AGAINST WOMEN IN ASIAN SOCIETIES* 93–113 (L. Bennett & L. Manderson eds., 2003).

³⁴ CIVIL CODE [C. CIV.], art. 163, Julian Rouyrre trans. (copy on file with the author).

³⁵ DAVID STEINBERG, *CAMBODIA: ITS PEOPLE, ITS SOCIETY, ITS CULTURE* 85 (1959); Heuveline & Poch, *supra* note 11, at 101.

The big difference between the marriage that Pol Pot organized and the normal traditional Khmer marriage is that they have to ask the parents of the one we loved for the consent first and then for the individual consent. And if they both agree, the parents have to arrange the marriage and a party. During Pol Pot time, they did not follow the tradition. They just arranged it for us.³⁶

The Khmer Rouge appropriated the tradition of parents arranging marriages, telling respondents, “[Y]ou betray the nation because the *Angkar* is like your parent, if your parents order you to do something you have to follow their advice, otherwise you will be punished.”³⁷

The *Angkar* called groups of people to attend ceremonies (interviewees reported groups of between twenty and one hundred), and the couples stood in lines, the women on one side and the men on the other. At the ceremony the couples, who often had never seen each other before, joined hands and then recited a commitment statement, pledging faithfulness to their spouse and to *Angkar*.³⁸ The marriages do not seem to have followed any formal registration procedures, with only one interviewee reporting that she had been required to thumbprint a document recording the marriage.³⁹ The ceremonies were not followed by a celebration and the couples, particularly the April 17 people, returned immediately to work.⁴⁰

Many of the respondents complained bitterly that their parents were not allowed to fulfill their traditional role in arranging the wedding and attending the ceremony. One woman said: “I didn’t sleep with [my new husband] because I was angry with the *Angkar* because the *Angkar* didn’t ask my parents and my parents didn’t get to come to the ceremony.”⁴¹

³⁶ Interview with Base Woman, in Cambodia (July 24, 2006).

³⁷ Interview with Base Woman, in Cambodia (July 11, 2006).

³⁸ Interviews with April 17 Women, in Cambodia (July 6, 11, 18, and 19, 2006), interviews with Base Women, in Cambodia (July 6, 11, 12, 24, and 27, 2006), interview with Base Men, in Cambodia (July 24, 25, and 26, 2006), interview with male soldier, in Cambodia (July 7, 2006), interview with April 17 Man, in Cambodia (July 18, 2006).

³⁹ Documents in Cambodia are formalized with a thumbprint rather than a signature. Interview with Base Woman, in Cambodia (July 24, 2006).

⁴⁰ This was commonly reported by interviewees. See, e.g., Interview with April 17 Woman, in Cambodia (July 6, 2006); Interview with Base Woman, in Cambodia (July 24, 2006).

⁴¹ Interview with April 17 Woman, in Cambodia (July 24, 2006).

Another woman explained that her parents did not know about the wedding and were not allowed to attend: “[T]hat made me very sad.”⁴²

While the study found no direct evidence of who implemented the policy of forced marriage from within the Khmer Rouge, it was likely the idea of the senior leadership, carried out by lower level functionaries. This theory of events is indicated by the similarity in the form of marriage ceremonies across the country at this time and by the large number of people who reported they were married in these ceremonies.⁴³ Henri Locard, who has assembled a number of Khmer Rouge slogans and policy statements, reported a slogan related to the marriage policy: “1. You can choose your spouse yourself; 2. *Angkar* endorses [your partner]; 3. If you do not obey *Angkar*’s discipline, you will be sent to a study session for a time.”⁴⁴ Locard characterizes this policy as “another example of Orwellian ‘doublethink’. Young people had to accept a partner chosen by the Party and at the same time convince themselves that it was their own personal choice.”⁴⁵

The Khmer Rouge considered those who refused to marry an enemy of the *Angkar*. As one woman who was forced to marry explained, “If you didn’t accept the spouse, you were not a person who loves the *Angkar* and you are known as the enemy against the nation.”⁴⁶

The couples were almost always of the same class; April 17 people were only married to April 17 people. The policy did extend to Khmer Rouge forces. A former Khmer Rouge soldier said that in 1977 he received orders from the *Angkar* to marry a woman of higher military rank than himself:

I refused because I was young I did not want wife, and I did not know where my parents were. I spoke to *Angkar* because I did not agree with this [the marriage], then *Angkar* took me to prison. *Angkar* said to me “you have to marry because you have a background of fighting so *Angkar* has to prepare marriage for you.”⁴⁷

⁴² Interview with April 17 Woman, in Cambodia (July 6, 2006).

⁴³ Trends observed from an analysis of the interviews conducted for the Study.

⁴⁴ LOCARD, *supra* note 23, at 266.

⁴⁵ *Id.*

⁴⁶ Interview with April 17 Woman, in Cambodia (July 17, 2006).

⁴⁷ Interview with a former Khmer Rouge Soldier, in Cambodia (July 7, 2006).

The soldier was imprisoned for two months. While in custody his wife visited him and had sex with him. At the end of his imprisonment he was sent back to live with her but he continued to reject the marriage. His military commander exiled him to a position on the Vietnamese border.⁴⁸

There is evidence to suggest that officials gave some military and disabled veterans the privilege of selecting a woman to marry and that they were entitled to select not only women of the same political class, but also April 17 women. Michael Vickery has suggested that offering marriage as a reward to cadres and disabled veterans could not have been common, given that:

[t]he rules prohibiting extramarital sexual relations and limiting marriages to people of the same social category were so strictly applied, there would seem *a priori* to have been little scope for the alleged forced marriages between revolutionary soldiers and evacuee women.⁴⁹

Some April 17 women did report being married to cadres at the cadres' request.⁵⁰ Sex within these unions did not violate government policy, as sex *within* marriage was not only tolerated but accepted both by Cambodian custom and Government policy. The "prize" awarded to these cadres and veterans was that they were allowed to select any woman of their choosing, although such inter-class marriages remained uncommon.

C. Coercion: Threats, Physical Punishment and Sexual Violence

To ensure compliance with the policy, those charged with implementing the policy used a variety of coercive means. This coercion was particularly effective doubtless because it occurred within the larger context of a violent regime where arbitrary and brutal punishments were common for all manner of transgressions.⁵¹ The interviewees reported being frightened of punishment or execution had they refused to marry. As one woman explained, "I knew if I refused the marriage I would be beheaded because I saw this many times. During the wedding ceremony we were

⁴⁸ *Id.*

⁴⁹ VICKERY, *supra* note 11, at 175.

⁵⁰ Interview with April 17 Woman, in Cambodia (July 7, 2006).

⁵¹ *See generally* BECKER, *supra* note 11.

forced to hold hands, expressing our love but we refused, until soldiers who guarded nearby pointed the rifle at us.”⁵²

Another woman explained her futile attempts to resist marriage and her fear of punishment:

They said I had to get married again and I said I didn’t want to. They said they would kill me if I didn’t agree. For five days I tried to deny them but I had to agree because they threatened me. In 1979 *Angkar*’s policies were very strict, there were no exceptions. There were 50–60 people at the ceremony. It had nothing to do with Cambodian tradition. Couples were called to speak in front of everyone to say they would stay married. After the ceremony some people committed suicide because they were upset and disappointed but I struggled and I thought I would fight against it. I didn’t know him before the ceremony; he was from a different village. I took a seat and he was in front of me. I had to stay with him otherwise both of us would be beaten or killed.⁵³

Others reported the use of sexual violence to force women into marriages. One woman described how her niece refused to marry during a ceremony and was then taken by the *Teahean Khmer Krohom* (Khmer Rouge soldiers) before likely being raped and killed. The young woman’s aunt described hiding in the bushes before becoming so frightened she ran away. As she ran, her niece caught sight of her and called, “Aunt! Help me please!” The soldiers said, “Who is your aunt? Call her to come here now! I will kill all of you!” but the woman continued running. She never saw her niece again and believes she was murdered.⁵⁴ Another woman reported being taken to a re-education camp for refusing to marry. Once there, she was shown other women who were naked and tied. She was told they had been raped and the same thing would happen to her if she continued to refuse to marry. She said, “A Khmer Rouge soldier who was kind to me persuaded me to marry my husband and to follow the *Angkar* in order to save my life. So I followed him, and then they released me.”⁵⁵

Other Cambodians described taking a more active role in entering into a “forced marriage.” One woman said she married, with the help of a

⁵² Interview with April 17 Woman, in Cambodia (July 6, 2006).

⁵³ Interview with April 17 Woman, in Cambodia (July 6, 2006).

⁵⁴ Interview with Base Woman, in Cambodia (July 24, 2006).

⁵⁵ Interview with Base Woman, in Cambodia (July 27, 2006).

cooperative leader, in order to conceal her identity after a military unit attempted to rape her;⁵⁶ another married to conceal a pregnancy that resulted from a rape.⁵⁷ The opportunity for marrying voluntarily in Democratic Kampuchea was limited by the fact that the Khmer Rouge controlled all marriages. However, there were stories of local leaders allowing love matches, at least amongst base people, although even then they were married in group ceremonies and sent to work separately after the “honeymoon” period. A woman, classified by the Khmer Rouge as a base person, reported that while most people did not know who they were going to marry before the ceremony, the cooperative leader told her in advance and arranged for her to marry a man she was in love with.⁵⁸

These examples raise questions of agency and of the role that a “victim” might play in bringing about a marriage. At the same time, as the examples show, where there was a degree of agency in Democratic Kampuchea in selecting marriage partners, such agency was usually only exercised out of fear of still greater punishment for violating the rules against sexual contact outside marriage. The Khmer Rouge policy included punishment for victims and perpetrators of rape as they drew no distinction between consensual and non-consensual sexual contact.⁵⁹ The Study found little evidence of genuine choice. Where people made an active decision, it was in exercising a strategic choice between two repugnant options.

D. Enforced Sexual Contact between Spouses

The *Angkar*’s expectation was that after the marriage the couples would have sex. They needed the population to reproduce in order to provide agricultural labor, a cornerstone of the revolution. Given that the Khmer Rouge did not want attachments or love to develop,⁶⁰ couples spent only a few days together after the ceremony. After that, they were only allowed to meet periodically: “[T]he puritanism of the regime restricted many newlyweds from living together and provided for conjugal visits a few times a month when the wife believed herself fertile.”⁶¹

⁵⁶ Interview with Base Woman, in Cambodia (July 27, 2006).

⁵⁷ Interview with April 17 Woman, in Cambodia (July 11, 2006).

⁵⁸ Interview with Base Woman, in Cambodia (July 6, 2006).

⁵⁹ BECKER, *supra* note 11, at 224.

⁶⁰ See *supra*, notes 13 and 14.

⁶¹ BECKER, *supra* note 11, at 257.

Almost all the informants reported that they believed that the *Angkar* required them to have sex with their new spouse. *Chhlop* (militia) would come and observe the “honeymoon” houses arranged by the *Angkar* to see if the couples were fighting and if they were having sex.⁶² A Cham woman (a Muslim minority), who was eventually forced to marry after twice refusing, said that after the wedding “the *chhlop* came to see whether we had sex or not, if not they would take us to be educated. We were both willing to have sex because we were afraid of *Angkar*.”⁶³ Other couples worked together to hide from the *Angkar* that they were not having sex until they both felt ready. One woman explained that she and her husband were too scared to have sex initially, but her husband was very gentle and told no one.⁶⁴

Whether sexual activity within marriages was consensual or non-consensual was of no concern to the *Angkar*. The Khmer Rouge’s sexual policy was only against sexual relationships outside of marriage; there was no policy or law against rape *per se*. Some spouses took advantage of this to abuse their new partner with impunity, knowing their spouses could not complain or refuse to comply without attracting the punishment from the regime. As one interviewee explained her experience:

When I refused to have sex with [my husband] after the marriage, he reported it to the cadres, then they came to catch me and then in the house they forced me to take off my clothes in order that [my husband] can rape me. They said if I do not agree they will kill me. If I agree to have sex with him they will leave. So I had to agree because I had no choice.⁶⁵

Another woman who attempted to resist her marriage and any sexual contact with her new husband explained that her husband felt he had a right to have sex with her: “He forced me to have sex because he has a right to have sex and he got angry and beat me.”⁶⁶ Rape within marriage reflects, in part, the traditional Cambodian view that women are obliged to have sex with their husbands.⁶⁷ The Khmer Rouge, who saw marriage as a

⁶² Frequent observation of those interviewed for the Study.

⁶³ Interview with April 17 Woman, in Cambodia (July 16, 2006).

⁶⁴ Interview with April 17 Woman, in Cambodia (July 11, 2006).

⁶⁵ Interview with April 17 Woman, in Cambodia (July 27, 2006).

⁶⁶ Interview with April 17 Woman, in Cambodia (July 6, 2006).

⁶⁷ Surtees, *supra* note 34, at 97–98.

way to ensure sexual activity and therefore reproduction, seemed to have shared this view. A former child soldier outlined the policy for cadres who wished to marry a woman. His explanation highlights the idea that rape is not possible inside a marital relationship:

One good thing about the Khmer Rouge was that if you wanted to marry someone you could suggest it to the *Angkar* but raping was absolutely prohibited. . . . You can marry anyone you love but you have to ask her and then suggest to the *Angkar*. If she did not agree then the *Angkar* would force her.⁶⁸

E. Consequences

For many respondents, the experience of being forced to marry someone they did not know, without the involvement of their parents and against Cambodian tradition, was as bitter as any other they suffered during the brutal regime.⁶⁹ Many of the women interviewed reported that the marriage during the regime was their second, their first husbands having been murdered by the regime early in the revolution.⁷⁰ They resisted remarriage because they deeply resented being forced to marry another man by the same regime that had killed their first husbands.

Some couples agreed to separate when the regime fell. A woman who was forced to marry during Democratic Kampuchea explained how she refused to follow her husband to his village to continue the marriage when the country was liberated by the Vietnamese in 1979:

I didn't want to go back because I didn't love him. . . . We both agreed to give a thumbprint in order to divorce each other and the chief of the village said that if you didn't love each other you can put a thumbprint in order to divorce, it is up to both of you. . . . I didn't love him because he had black skin.⁷¹

⁶⁸ Interview with former Khmer Rouge Soldier, in Cambodia (July 20, 2006).

⁶⁹ Frequent observation of those interviewed for the Study.

⁷⁰ Interview with April 17 Woman, in Cambodia (July 19, 2006); Interview with April 17 Woman, in Cambodia (July 6, 2006); Interview with April 17 Woman, in Cambodia (July 7, 2006); Interview with April 17 Woman, in Cambodia (July 26, 2006).

⁷¹ Interview with Base Woman, in Cambodia (July 23, 2006).

Another woman, who had two children to her husband between 1975 and 1979, said that she had never formally sought a divorce but separated from her husband when the Vietnamese came:

My husband said, if you come with me you are my wife but if you stay here you are not my wife anymore. So my husband went to Thailand and I stayed in the village. After that I heard the news from him that he had another wife so I decided to marry with another man.⁷²

Others, however, remained in their marriages for a variety of reasons—a desire to maintain the family unit, financial necessity, a need for protection, or the influence of cultural norms against separation.⁷³ One woman who decided before the regime ended that she would have to remain with her husband explained her reasons:

First I lived with him for 4 months because *Angkar* did not let me to go to work far away from the village. Then I tried to escape from him because, no problem at all, but I did not love him. I wanted to go far away from him. In 1978 I came back to live with him, at that time I was pregnant. I did not want to be separated from him anymore because I did not want my child to have no father.⁷⁴

Another woman explained that she stayed with her husband because she “fe[lt] pity for him because he is disabled and Khmer women cannot marry many times.”⁷⁵ A male respondent explained why he had stayed with his wife: “In Khmer culture if a woman loses her virginity to her husband he is responsible so we didn’t get divorced.”⁷⁶

For some women the marriage meant remaining with a man who, while also a victim of forced marriage, had become a perpetrator of violence against her. One woman tried to separate from her husband after the Vietnamese invasion because he had abused her. She explained:

⁷² Interview with April 17 Woman, in Cambodia (July 11, 2006).

⁷³ Reasons given by those interviewed for the Study.

⁷⁴ Interview with April 17 Woman, in Cambodia, (July 7, 2006).

⁷⁵ Interview with April 17 Woman, in Cambodia (July 25, 2006).

⁷⁶ Interview with Base Man, in Cambodia (July 26, 2006).

The ceremony was from 8am–10am. At 10am we went back to work and then after that we were together. That night two Pol Pot [Khmer Rouge] soldiers came and made sure we were sleeping together, I could hear them walking around. My husband beat my legs with his hand so that I couldn't fight and it made it easier for him to have sex with me. He forced me to have sex because he has a right to have sex and he got angry and beat me.

We stayed together and had six children. I wanted to divorce him because he was very drunk and abusive. I proposed that we split up [after 1979] but he didn't agree and he came with me to Siem Reap. After that we stayed together until we had six children. He died in 1993. I asked him whether he loved me and whether he had wife or not. He said he loved me and had no wife but in fact, he had a wife in Kompong Thom. After the six children were born he left and went back to Kampong Thom. That was the same year he died. He drank a lot and he died from drinking too much.⁷⁷

Some respondents reported that after some time they came to love their spouse.⁷⁸ One male respondent seemed offended by a question about why he and his wife had stayed with each other, stating it was “[b]ecause we want to live together. Because after the marriage we loved each other.”⁷⁹

The Khmer Rouge policy of forced marriage impinged on the lives of thousands of Cambodians. Its effects continue to resonate more than 30 years after the fall of the regime. As the ECCC slowly works towards the prosecution of the senior leaders of the Khmer Rouge for some of the most horrific crimes like murder, forced labor, torture, and starvation, the lesser known story of the desecration of the family and structure of marriage could be overlooked. It is important to remember that, like these other crimes, forced marriage is an act that has a lifelong impact on its male and female victims. It compels two people to spend the rest of their lives with a spouse whom they did not choose and who may serve as a constant reminder of what they suffered.

⁷⁷ Interview with April 17 Woman, in Cambodia (July 6, 2006).

⁷⁸ Observation of some interviewees in the Study.

⁷⁹ Interview with Base Man, in Cambodia (Aug. 7, 2006).

II. FORCED MARRIAGE: EXAMPLES FROM AFRICAN CONFLICTS

A. African Examples

The forced marriages in African conflicts have significant differences to those in Democratic Kampuchea. The most striking of these differences is that while in Democratic Kampuchea it was common for both spouses to be coerced into the marriage, in the Sierra Leone, Rwandan, Mozambique, and Ugandan conflicts discussed below, the husband was more commonly the perpetrator. A member of the armed forces, the “husband” would simply declare the girl or woman to be his “wife” (often following a brutal abduction) and she would be obliged to live with him and serve him as a domestic and sexual slave.⁸⁰

1. Sierra Leone

The issue of forced marriage came to the attention of the Prosecutor of SC-SL as a “widespread” practice during the conflict in Sierra Leone that raged between 1990 and 2001.⁸¹ Members of the rebel factions had abducted numerous women and girls and held them in their camps. The abductions themselves were violent, with rebels often subjecting women to sexual assaults and killing family members who tried to protect the women and girls.⁸² The women and girls were assigned or “given” to a rebel and became what was known as a “bush wife” or “rebel wife.”⁸³ They were

⁸⁰ HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996), available at <http://www.hrw.org/reports/1996/Rwanda.htm>; HUMAN RIGHTS WATCH, WE’LL KILL YOU IF YOU CRY: SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT (2003), available at <http://www.hrw.org/reports/2003/sierraleone/sierleon0103.pdf>; Meredith Turshen, *The Political Economy of Rape: An Analysis of Systematic Rape and Sexual Abuse of Women during Armed Conflict in Africa*, in VICTIMS, PERPETRATORS OR ACTORS? GENDER, ARMED CONFLICT AND POLITICAL VIOLENCE 55 (Caroline O. N. Moser & Fiona C. Clark eds., 2001); AFRICA WATCH/HUMAN RIGHTS WATCH, CONSPICUOUS DESTRUCTION: WAR, FAMINE AND THE REFORM PROCESS IN MOZAMBIQUE (1992); CARLSON & MAZURANA, *supra* note 15.

⁸¹ Press Release, Special Court for Sierra Leone, The Office of the Prosecutor, Prosecutor Welcomes Arraignment of RUF and AFRC Indictes on Charges Related to Forced Marriage, *supra* note 6.

⁸² HUMAN RIGHTS WATCH, WE’LL KILL YOU IF YOU CRY: SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT, *supra* note 81, at 42.

⁸³ *Id.*

forced to submit sexually to their “husband” and to cook, clean, and carry and bear his children. Only a few had relationships formalized by a ceremony; the vast majority were simply given the label “wife.” The relationships were often polygamous, with rebels having multiple “wives.”

Rebels also changed “wives” frequently when they tired of them or when their “wives” were too ill to perform their tasks (a consequence of the brutality to which they were often subjected). . . . Abducted women were made to carry out forced labor during their captivity, including cooking, cleaning, washing clothes, and carrying heavy loads of ammunition and looted items.⁸⁴

The *Human Rights Watch* report on Sierra Leone acknowledged that some marriages that took place during the Sierra Leone conflict, which may initially look like forced marriages, were actually entered into voluntarily:

Not all were abductees: some women and girls voluntarily joined the rebel forces and sought to benefit from their relationship with the rebels, i.e. from the looted goods or escaping from their parents (some girls would use a relationship with a rebel boyfriend to gain freedom from parental control, by threatening to involve the boyfriend in their dispute over parental restrictions). Such women consenting to marry a rebel were probably still vulnerable to sexual violence from other rebels.⁸⁵

The degree of agency in the Sierra Leone conflict was often less clear than this. Girls and women were trapped in a Morton’s Fork, forced to decide between an unwanted union, which gave some protection, or being exposed to the risk of rape by any rebel. As the SC-SL Prosecutor said in opening the trial against former Liberian president Charles Taylor:

You will hear that Sierra Leonean women captured by the RUF or AFRC were forced to make strategic choices that no woman should ever have to make. These women would seek to become attached to a single commander or fighter as a “bush wife” because this was the best way to limit the abuse they would suffer. The alternative was that [*sic*], and I quote a witness, “to be treated like a football in the field,” being exposed to one rape

⁸⁴ *Id.* at 43.

⁸⁵ *Id.*

after another perpetrated by many men without any consideration for health, feelings or lives.⁸⁶

That label of “wife” caused ongoing suffering for women. Tainted by their association with the rebel forces and the sexual violence they suffered, many were unable to reintegrate into their communities.⁸⁷ At the end of the conflict, they were “often not able to return to their villages out of fear, lack of funds, and social stigma, especially if they ha[d] given birth to children fathered by rebels.”⁸⁸

2. Mozambique

Similar stories emerged from the civil war in Mozambique (1976–1992), in which the rebel force of Resistência Nacional de Moçambique (RENAMO) fought the government Frente de Libertação Nacional (FRELIMO). As one Mozambican woman explained:

They [Renamo] were killing our people—we were seeing them. Then they were coming to us as husbands. Can you afford to face such a thing? At the camp I was chosen to be the “wife” of the commander. And others together with my children were given as “wives” to other soldiers. We feel it because the Renamo were showing us guns that if we don’t do these things—sleep with them and cook for them—they will kill us. We did these things. So that was a terrible thing that happened to us. What has happened to us—our properties have been damaged, our bodies have been damaged.⁸⁹

Both FRELIMO and RENAMO recruited and forced girls and women to serve as “wives” to their forces.⁹⁰ As in Sierra Leone, the

⁸⁶ Transcript of Prosecution Opening Statement at 63, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-T (Sierra Leone Trial Chamber II).

⁸⁷ HUMAN RIGHTS WATCH, *WE’LL KILL YOU IF YOU CRY: SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT*, *supra* note 81, at 44–45.

⁸⁸ *Id.*

⁸⁹ Turshen, *supra* note 81.

⁹⁰ SUSAN MCKAY & DYAN MAZURANA, *RIGHTS & DEMOCRACY, WHERE ARE THE GIRLS? GIRLS IN FIGHTING FORCES IN NORTHERN UGANDA, SIERRA LEONE AND MOZAMBIQUE: THEIR LIVES DURING AND AFTER THE WAR* (2004) *available at* <http://www.dd-rd.ca/site/publications/index.php?subsection=catalogue&lang=en&id=1401>; AFRICA WATCH/HUMAN RIGHTS WATCH, *supra* note 81.

abductions themselves were often violent and the women and girls taken were subjected to forced labor and sexual violence.⁹¹ Girls and women returning with children born of rape were discriminated against.⁹²

3. *Rwanda*

During the 1994 Rwandan genocide, thousands of women were subjected to brutal sexual violence. In the year following the genocide, *Human Rights Watch* conducted research into sexual violence during the conflict and found instances where women had been held captive by militia and labeled “wife”:

As militia killed and pillaged, their members often singled out women to be held for their personal sexual service. They locked these women in their own homes or in the captors’ homes, sometimes briefly, sometimes for the duration of the genocide. . . . The arrangement was sometimes referred to as “forced marriages” and the women so held as “wives.”⁹³

Human Rights Watch explained some of the lasting effects these “marriages” had on the victims, noting that women held in forced marriages “show enormous conflict when they describe the situation.”⁹⁴ The “wives” had no choice in their “husbands” and in “most cases” despised him. However, they also recognized that “without the protection of this very man (who in many cases murdered the rest of their family), they would most probably be dead today.”⁹⁵ They suffered guilt at having survived when their family members had not, a “sentiment [that] is further reinforced by many of the Tutsi returnees from Zaire, Burundi or Uganda who accuse these women of having ‘collaborated’ with the Hutu militias.”⁹⁶

⁹¹ MCKAY & MAZURANA, *supra* note 91.

⁹² *Id.* at 6.

⁹³ HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH, *supra* note 81.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

4. *Uganda*

The stories from the civil war in Uganda between the government and the Lord's Resistance Army are strikingly similar to those in the conflicts in Sierra Leone, Rwanda, and Mozambique. There are stories of women being forcibly abducted, held as "wives" (often in polygamous "marriages"), forced to perform domestic labor (cooking, water collection, food cultivation), and provide sexual services, only to face alienation from their communities when they returned at the end of the conflict, often with the children of their "marriages."⁹⁷

B. African Examples and Democratic Kampuchea

The conduct labeled "forced marriage" in African conflicts stands in contrast to what could be considered "forced marriage" in Democratic Kampuchea. The most significant difference is that in the African conflicts armed rebels took women and forced them to serve as their wives—the relationship was one of victim-perpetrator. The victim-perpetrator relationship often involved ongoing brutality and an inequality between the "husband" and "wife" that clash with western notions of marriage. The Cambodian example more commonly involved a victim-victim relationship. The perpetrator stood outside, while the two victims could sometimes support each other and do their best to create a workable marriage with their spouses.

These differences may explain the almost irresistible urge to use quotation marks around the terms "marriage," "husband," and "wife" when discussing these relationships in the African context, an impulse which is lacking when discussing the Cambodian example. The differences may, however, reflect the different traditions in the countries. While Cambodia and Sierra Leone both have a tradition of arranged marriage, Sierra Leone has a history of marriage by capture that requires nothing other than a declaration by the captor that he is taking the captive as his wife.⁹⁸ Sierra Leone's Truth & Reconciliation Commission commented that:

⁹⁷ For a detailed discussion of forced marriage in the Lord's Resistance Army, see generally CARLSON & MAZURANA, *supra* note 15.

⁹⁸ Karine Bélair, *Unearthing the Customary Law Foundations of Forced Marriages during Sierra Leone's Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women's Rights in Post-Conflict Sierra Leone*, 15 COLUM. J. GENDER & L. 551 (2006) (citing H. M. JOKO SMART, SIERRA LEONE CUSTOMARY LAW 28–29 (1983)).

[the] abductions and use of young girls and women as bush wives and sex slaves by armed groups during the war could be attributed to the traditional beliefs that governed this issue prior to the war. Some of the armed groups did not consider it an aberration to rape young women or use them as sex slaves.⁹⁹

The next section examines the SC-SL's treatment of "forced marriage" as a crime against humanity against the background of these two different factual situations, both of which attract the colloquial use of the term "forced marriage."

III. SPECIAL COURT FOR SIERRA LEONE'S PROSECUTION OF FORCED MARRIAGE

In 2005 forced marriage was recognized as an international crime for the first time when the Special Court for Sierra Leone (SC-SL) allowed the prosecutor to amend the indictment against three accused—all senior members of the armed faction of the Armed Forces Revolutionary Council (AFRC)—to add a charge of forced marriage as a crime against humanity.¹⁰⁰ The Trial Chamber amended the AFRC indictment to add forced marriage as an inhumane act, the residual category of acts that constitute crimes against humanity in the SC-SL statute.¹⁰¹

Marriage without consent of both parties has been acknowledged as a violation of international human rights law since at least the Universal Declaration on Human Rights 1948, which states: "Marriage shall be entered into only with the free and full consent of the intending spouses."¹⁰²

⁹⁹ Bélair, *supra* note 99, at 595 (quoting SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, WITNESS TO TRUTH (2004), available at www.trcsierraleone.org).

¹⁰⁰ Prosecutor v. Brima, Case No. SCSL-2004-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment, (May 6, 2004), available at <http://www.scs-sl.org/CASES/ProsecutorsvsBrima> KamaraandKanuAFRCCase/TrialChamberDecisions/tabid/157/Default.aspx (follow "SCSL-04-16-PT-070-5330-5344"; for dissenting opinion, follow "SCSL-04-16-PT-070-5330-5344").

¹⁰¹ See S.C. Res. 1315, U.N. Doc. S/Res/1315 (Aug. 14, 2000); STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE, art. 2 (2002), available at <http://www.scs-sl.org/LinkClick.aspx?fileticket=uClnd1MJEW%3d&tabid=176>.

¹⁰² Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess, 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), art. 16.

This declaration has been repeated in a number of human rights instruments.¹⁰³

Facts that might give rise to the use of the term “forced marriage” have previously been raised in the International Criminal Tribunal for Rwanda (ICTR)¹⁰⁴ and the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹⁰⁵ but the criminal acts were charged as rape rather than as a separate offense of forced marriage.¹⁰⁶ The prosecutor for the SC-SL, however, attempted “to expand international jurisprudence by bringing a new charge of ‘forced marriage’ as a crime against humanity.”¹⁰⁷ The Prosecutor’s decision to amend the AFRC indictment was consciously feminist. In a press release after the indictment was amended, then-Prosecutor David Crane said:

¹⁰³ The statement appears again in the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Mar. 23, 1976), art. 23(3). Marriage must be entered into with the free consent of the intending spouses. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess. Supp. (No. 16), at 49, U.N. Doc. A/6316 (Dec. 16, 1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, art. 10(1). No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (Marriage Convention), G.A. Res. 1763A (XVII) (Nov. 7, 1962), entered into force Dec. 9, 1964, art. 1(1). The Marriage Convention has sixteen signatories and fifty-four parties but Cambodia has not signed or ratified the Marriage Convention. The betrothal and marriage of a child shall have no legal effect. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (1979), art. 16(2).

¹⁰⁴ The United Nations Security Council created the ICTR by resolution 955 of 8 November 1994 acting under Chapter VII of the United Nations Charter. The ICTR has jurisdiction to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between Jan. 1, 1994 and Dec. 31, 1994. For information about the ICTR, see generally International Criminal Tribunal for Rwanda, <http://www.ictr.org> (last visited April 1, 2010).

¹⁰⁵ The ICTY, like the ICTR, was created by the United Nations Security Council exercising its Chapter VII United Nations Charter jurisdiction. It is mandated to try those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991. For information about the ICTY, see generally International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org> (last visited April 1, 2010).

¹⁰⁶ *AFRC Trial Chamber Decision*, Separate Opinion of Justice Sebutinde, at *573 n.3453.

¹⁰⁷ *AFRC Appeals Chamber Decision*, ¶ 181; Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone’s Rape Victims*, 18 HARV. HUM. RTS. J. 85, 101 (2005).

These additional charges of crimes against humanity reflect the fact that women and girls suffered greatly during the war, including through widespread forced marriage . . . The Office of the Prosecutor is committed to telling the world what happened in Sierra Leone during the war, and gender crimes have been at the core of our cases from the beginning. These new charges recognise another way that women and girls suffered during the conflict.¹⁰⁸

The prosecutor's comments reflect the success of feminist activism in vigorously advocating for the recognition of gender crimes in international humanitarian law. Feminist activism has made what Janet Halley has called "breathtaking advances" in the "rapidly evolving world of international law" and has included direct lobbying of the *ad hoc* international criminal tribunals to have the prosecutor pursue gender offenses.¹⁰⁹ Kelly Askin, one of the project's most vocal proponents, has called the effort to "redress[] crimes committed disproportionately against women and girls, particularly rape and sexual slavery" a "revolutionary advance" which has established "critical precedential authority for

¹⁰⁸ Press Release, Special Court for Sierra Leone, The Office of the Prosecutor, Prosecutor Welcomes Arraignment of RUF and AFRC Indictes on Charges Related to Forced Marriage, *supra* note 3. See also Press Release, Special Court for Sierra Leone, Office of the Prosecutor, Statement of the Prosecutor on International Women's Day (Mar. 8, 2005), available at <http://www.sc-sl.org/PRESSROOM/OTPPressReleases/tabid/196/Default.aspx> (follow "Statement of the Prosecutor on International Women's Day"). In the Statement of the Prosecutor on International Women's Day, the Prosecutor referred to the amended indictment before saying:

The trials in Freetown shine a light on hard truths of the past conflict, offer some justice for the victims, and make future atrocities less likely. . . . But across Africa women and girls continue to be the primary targets of war. From Darfur, Sudan to the Democratic Republic of Congo, women and girls still suffer unimaginable brutalization by armed forces. They are murdered, raped, displaced, forced into combat as reluctant soldiers, support personnel, or into forced marriage arrangements with male fighters. They are treated like beasts of burden. On this International Women's Day, the Special Court for Sierra Leone continues to address the injustices of one African conflict. Now the world must recommit itself to ending ongoing violence against women and girls across the continent of Africa, and holding the perpetrators to account.

Id.

¹⁰⁹ Halley et al., *supra* note 13, at 340–344.

redressing these crimes in other fora and conflicts.”¹¹⁰ Against this background, the amendment to the AFRC indictment can be seen as part of this activism to address the “history of impunity for gender-based crimes” and to “bring . . . [gender crimes] to the full attention of the international community.”¹¹¹

Having opened the door to a separate charge of forced marriage, the SC-SL had to distinguish this new and undefined offense from the established crime of sexual slavery. Sexual slavery appears as a specifically enumerated act in the Statute of the SC-SL as a crime against humanity along with rape, enforced prostitution, and forced pregnancy.¹¹² The specific elements of sexual slavery are set out in Article 7(1)(g) of the Rome Statute for the International Criminal Court’s Elements of Crimes:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The perpetrator committed such conduct intending to engage in the act of sexual slavery or in the reasonable knowledge that it was likely to occur.¹¹³

¹¹⁰ Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law; Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 288 (2003).

¹¹¹ Kelly Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT’L L. 97, 99 (1999).

¹¹² Establishment of a Special Court for Sierra Leone, S.C. Res. 1315, U.N. Doc. S/RES/1315 (2000) (Aug. 14, 2000), art. 2 (citation omitted).

¹¹³ Assembly of States Parties to the Rome Statute of the International Criminal Court, U.N. Doc. ICC-ASP/1/3 (Sept. 3–10, 2002), art. 7(1)(g) [hereinafter Rome Statute]. The Rome Statute for the International Criminal Court is an international treaty binding only on States Parties, those states who have ratified the Rome Statute. In general terms it has jurisdiction over genocide, crimes against humanity, and war crimes, as defined in the Rome Statute, taking place in the jurisdiction of States Parties or committed by a national of a State Party since July 1, 2002 (though there are nuances to these rules of jurisdiction). For information about the ICC, including for a copy of the Rome Statute, see International Criminal Court, <http://www.icc-cpi.int> (last visited April 1, 2010).

In the Sierra Leone context, the behavior that might warrant the label forced marriage on its face, at least, also met the elements of sexual slavery—the perpetrator exercised powers attaching to the right of ownership and caused the person to engage in acts of a sexual nature.

To convince the SC-SL that “forced marriage” amounted to a separate offense, the prosecution needed to pinpoint what it was about “forced marriage” in the Sierra Leone conflict that was different from “sexual slavery.” This was a question with which both the Trial and Appeals Chambers wrestled.

A. Trial Chamber Decision

At trial the prosecution submitted a definition of forced marriage to the Trial Chamber:

[W]ords or other conduct intended to confer a status of marriage by force or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment, with the intention of conferring the status of marriage.¹¹⁴

The Trial Chamber seems to have accepted that definition, but the majority rejected the charge of “other inhumane acts—forced marriage” for redundancy. The majority considered that, if forced marriage was a sexual crime, it had to be prosecuted under Article 2(i), which includes the offenses of “rape, sexual slavery, enforced prostitution, forced pregnancy and *any other form of sexual violence*” (emphasis added). As forced marriage was in the indictment as an “other inhumane act” under Article 2(g), the majority reasoned it must be a non-sexual offense.¹¹⁵

The majority held that the prosecution had insufficient evidence to establish a crime of non-sexual forced marriage independent of sexual slavery or to support a finding that the act of conferring the status of marriage without consent caused a harm as grave as the other acts enumerated as crimes against humanity. They stated:

The Prosecution evidence in the present case does not point to even one instance of a woman or girl having had a bogus

¹¹⁴ *AFRC Trial Chamber Decision*, at ¶ 585 (citing Prosecution Final Brief at ¶¶ 1009–1012).

¹¹⁵ *AFRC Trial Chamber Decision*, at ¶ 697.

marriage forced upon her in circumstances which did not amount to sexual slavery. Not one of the victims of sexual slavery gave evidence that the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental.¹¹⁶

The majority concluded that by using the term “wife” the perpetrator was expressing a relationship of “ownership and . . . control . . . over the victim, including control of the victim’s sexuality, her movements and her labor” and not an intent to “assume a marital or quasi-marital status with the victim in the sense of establishing mutual obligations inherent in a husband-wife relationship.”¹¹⁷ Given the finding that marriage expressed ownership and that the perpetrators caused the victims to engage in sexual acts, they found that forced marriage was subsumed in sexual slavery. They concluded that “there is no lacuna in the law which would necessitate a separate crime of ‘forced marriage’ as an ‘other inhumane act’[.]”¹¹⁸

B. Appeals Chamber Decision

The Appeals Chamber reversed the Trial Chamber decision, finding forced marriage was not subsumed in sexual slavery but formed a distinct inhumane act of sufficient gravity to be considered a crime against humanity.¹¹⁹ The Appeals Chamber’s starting point was to distinguish forced marriage from sexual slavery and then derive a definition of forced marriage. Its holding, which was limited to the Sierra Leone conflict, was:

In light of the distinctions between forced marriage and sexual slavery, the Appeals Chamber finds that in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal

¹¹⁶ *AFRC Trial Chamber Decision*, at ¶ 710.

¹¹⁷ *Id.* at ¶ 711.

¹¹⁸ *Id.* at ¶ 713.

¹¹⁹ The Appeals Chamber rejected the Trial Chamber’s finding that other inhumane acts included only non-sexual offenses. They noted that the Trial Chamber may have been misled by the indictment, which listed forced marriage under the heading of sexual violence but found that the interpretation of other inhumane acts in this restrictive manner was incorrect. *AFRC Appeals Chamber Decision*, at ¶¶ 181–185.

partner resulting in severe suffering, or physical, mental or psychological injury to the victim.¹²⁰

The Appeals Chamber found two distinctions between forced marriage and sexual slavery: (1) the exclusivity of the relationship in the “forced marriage,” and (2) the “conjugal association” which went beyond forced sexual contact and encompassed other conjugal duties.¹²¹ The Appeals Chamber concluded that these distinctions meant forced marriage was not predominantly a sexual offense and could not therefore be subsumed in sexual slavery.¹²² It also distinguished the traditional practice of arranged marriage from forced marriage.¹²³ These attempts to carve out a niche for forced marriage deserve closer examination.

1. Exclusivity as a Distinction From Sexual Slavery

The Appeals Chamber said that “unlike sexual slavery, forced marriage implies a relationship of exclusivity between the ‘husband’ and ‘wife’[,] which could lead to disciplinary consequences for breach of this exclusive arrangement.”¹²⁴ The Appeals Chamber is referring here to the fact that a woman “married” to a rebel would be in a predominantly exclusive sexual relationship with her “husband,” whereas a woman taken by rebels was available to any rebel.¹²⁵ By relying on this as a distinction between forced marriage and sexual slavery the Appeals Chamber assumes that sexual slavery is not an exclusive relationship of owner-slave. Justice Doherty shares this assumption as she refers, in her partially dissenting judgment in the Trial Chamber, to the exclusive relationship between “husband” and “wife” as a ground for distinguishing sexual slavery from forced marriage.¹²⁶

While the evidence established this factual distinction in the Sierra Leonean conflict, it is not a convincing distinction between the general

¹²⁰ *Id.* at ¶ 196.

¹²¹ *Id.* at ¶ 195.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *AFRC Appeals Chamber Decision*, at ¶¶ 190 n.296.

¹²⁶ *AFRC Trial Chamber Decision*, Separate Opinion of Justice Doherty, at ¶ 50.

offenses of forced marriage and sexual slavery. The existence of multiple perpetrators is not an element of the offense of sexual slavery. In the Elements of Crimes commentary to the Rome Statute, “perpetrator” for the crime of sexual slavery is referred to in the singular.¹²⁷ A footnote records that “given the complex nature of this crime, it is recognized its commission *could* involve more than one perpetrator as a part of a common criminal purpose,” indicating that there is no requirement that there must be more than one perpetrator.¹²⁸ The exclusivity between the perpetrator and his victim is not a compelling distinction between sexual slavery and forced marriage; it is merely a factual distinction between victims who were subjected to broadly similar conduct—one group with the label “wives” attached, the other without.

2. Conjugal Association as a Distinction From Sexual Slavery

The other distinction relied on by the Appeals Chamber was that forced marriage compels a person into a “conjugal association.”¹²⁹ Earlier in the judgment the Chamber describes a “conjugal association” as involving not only sexual intercourse, but also other “conjugal duties” such as forced domestic labor (cleaning and cooking), child rearing, and pregnancy.¹³⁰ In this context the Appeals Chamber also refers to the reciprocity in the “conjugal association,” contrasting this with women not labelled “wife”:

They were often abducted in circumstances of extreme violence, compelled to move along with the fighting forces from place to place, and coerced to perform a variety of conjugal duties including regular sexual intercourse, forced domestic labor such as cleaning and cooking for the “husband”[,] endure forced pregnancy, and to care for and bring up children of the “marriage.” In return, the rebel “husband” was expected to provide food, clothing, and protection to his “wife,” including protection from rape by other men, acts he did not perform when he used a female for sexual purposes only.¹³¹

¹²⁷ Rome Statute, *supra* note 114.

¹²⁸ Rome Statute, *supra* note 114, art. 7(1)(g)-2.

¹²⁹ *AFRC Appeals Chamber Decision*, at ¶ 195.

¹³⁰ *Id.*

¹³¹ *Id.* at ¶ 190.

The Appeals Chamber is relying here on an element of reciprocity in the relationship that is absent in the case of women who were not given the title “wife.” Justice Doherty in her partial dissent also relied on this as a distinguishing factor. She found that the husband’s intention in the forced marriage was that the wife would work and care for him and his property, fulfill his sexual needs, remain faithful to him, and bear his children. In return he would protect the wife from rape by others, provide food, and confer his corresponding social status on her.¹³²

This distinction from sexual slavery is not only unpersuasive but is also regressive, rather than progressive, in the development of feminist international criminal law. The relationship of rebel-captive is no less a relationship of slavery because of some measure of reciprocity. In the ICTY case of *Prosecutor v. Kunarac*, both the Trial and Appeals Chambers, when defining enslavement (not sexual slavery) as a crime against humanity, cited *U.S. v. Pohl*:

Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery—compulsory uncompensated labor—would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.¹³³

That women held in these situations may also realize some relative benefits—for example, being provided with food, shelter, and protection from murder—makes them no less sexual slaves merely because they have these benefits. Justice Doherty recognized this, saying:

Whilst the status of “wife” conferred upon the Witness is a relative benefit as compared to other women who may have been forcibly married to persons of lower ranks, in my opinion this in

¹³² *AFRC Trial Chamber Decision*, Separate Opinion of Justice Doherty, at ¶ 49.

¹³³ *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/I-T, ¶ 525 (Sierra Leone Trial Chamber, Feb. 22, 2001) (citing *U.S.A. v. Pohl et al.*, Judgment of 3 Nov. 1947, reprinted in 5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, 958, 970 (1997); *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/I, ¶ 123 (Appeals Chamber, June 12, 2002) (same).

no way diminishes the seriousness of the acts committed against the witness.¹³⁴

Similarly, in Democratic Kampuchea, people reported that the advantage of marrying was avoiding the more difficult work assigned to the young, unmarried people. One April 17 man reported that while he had no choice about being married or who he would marry, he was willing to marry to avoid the difficult work and limited food assigned to unmarried men in the *kang chalat* (mobile work brigades).¹³⁵ As starvation was a real threat in Democratic Kampuchea, the marriage provided a very real benefit. It was still, however, a marriage without his or his wife's consent.¹³⁶

While not entirely clear from the judgment, it seems the Appeals Chamber was also distinguishing forced marriage from sexual slavery on the basis that the "marriage" relationship was not purely sexual but involved other "conjugal duties." The other "conjugal duties" are, as Justice Sebutinde in the Trial Chamber observed, gender-specific, stereotyped labor—cooking, cleaning, child rearing.¹³⁷ A perpetrator holding a woman for the primary purpose of sexual slavery may also subject her to gender-stereotyped forced labor, but that does not change the primary purpose of sexual slavery. *Prosecutor v. Kunarac* included prosecution for enslavement of women detained primarily to serve as sexual slaves but who were also forced to perform household work including cooking and cleaning.¹³⁸ The perpetrator of sexual slavery can also subject the victim to other forms of forced labor without this detracting from his or her status as a victim of sexual slavery.

¹³⁴ *AFRC Trial Chamber Decision*, Separate Opinion of Justice Doherty, at ¶ 41. Women who were married to high-ranking rebels benefited not only from protection but also were able to exert power over others. The women and girls often benefited from the looted items that their rebel husbands gave them and took part themselves in looting raids to steal clothes, shoes, and jewelry. HUMAN RIGHTS WATCH, *WE'LL KILL YOU IF YOU CRY: SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT*, *supra* note 81, at 42.

¹³⁵ Interview with Male New Person, in Cambodia (July 18, 2006).

¹³⁶ See also *supra* page 554, discussion regarding agency.

¹³⁷ *AFRC Trial Chamber Decision*, Separate Opinion of Justice Sebutinde, at ¶ 10–12.

¹³⁸ *Kunarac*, *supra* note 134, at ¶¶ 63, 188, 751 (Trial Chamber); *Kunarac* (Appeals Chamber), *supra* note 134, at ¶ 12. The primary purpose of the enslavement was to use the women for sexual services but the charge, to the disappointment of some commentators, was enslavement rather than sexual slavery. Halley et al., *supra* note 13, at 344.

3. *Forced Marriage vs. Arranged Marriage*

Both the Trial and Appeals Chambers were careful to draw distinctions between forced marriage and the local tradition of arranged marriage. Their efforts can be explained by a desire to avoid impugning local traditions, thereby overstepping the accepted boundaries of international criminal justice. Susan Mattler, who co-authored a briefing paper for the SC-SL Prosecutor on forced marriage,¹³⁹ explained her instructions for the task:

Her issue had an unusual stipulation: She needed to create a clear distinction between the custom of arranged marriage and the crime of forced marriage. Without this distinction, the court might also declare arranged marriage a war crime, and that is something the prosecutor did not want.¹⁴⁰

The Appeals Chamber approved the distinctions between arranged marriage and forced marriage drawn by Justices Sebutinde and Doherty, calling them “convincing.”¹⁴¹ Justice Sebutinde cited the prosecution expert’s evidence that, unlike in marriages taking place during peacetime, women were powerless within the forced marriages contracted during the conflict.¹⁴² The Appeals Chamber approved Justice Sebutinde’s distinction between arranged marriages involving minors, which violate human rights norms, and forced marriages, which involve abduction and sexual violence, as being “clearly criminal in nature.”¹⁴³ Justice Doherty, in a separate dissenting opinion, referred to the expert evidence in concluding that forced marriage during the conflict had “little or no similarity” to traditional marriage: “In particular the consent of the girl and/or her parents are not sought, there is no involvement of the family of either “spouse” and there is

¹³⁹ Michael Scharf & Suzanne Mattler, *Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone’s New Crime Against Humanity*, (Case Research Paper Series in Legal Studies, Working Paper 05-35, 2005) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=824291.

¹⁴⁰ Susan Iler, *Crimes Against Humanity*, CASE MAG., Winter 2005, http://www.case.edu/pubs/casemagazine/spring2005/features/lives_article.html.

¹⁴¹ *AFRC Appeals Chamber Decision*, at ¶ 194.

¹⁴² *AFRC Trial Chamber Decision*, Separate Opinion of Justice Sebutinde, at ¶ 11.

¹⁴³ *AFRC Appeals Chamber Decision*, at ¶ 194.

no ceremony or ritual fulfilled.”¹⁴⁴ These distinctions can equally be applied to the Cambodian example. While not all arranged marriages can be considered consensual, in general the practice is qualitatively different to that of forced marriage. In Democratic Kampuchea, marriages were unrelated to family traditions or the individuals but were instead part of the revolutionary policy to undermine social institutions and ensure reproduction within strict rules of sexual conduct.¹⁴⁵

In both Sierra Leone and Cambodia the tradition of arranged marriage is an institution of family. Forced marriages exploit that tradition, while remaining distinct from it.

The distinctions that the Appeals Chamber and Justice Doherty (in her dissent) found between forced marriage and sexual slavery are less than compelling. The different conclusions reached by the Trial and Appeals Chambers on whether the “forced marriages” in Sierra Leone amounted to slavery or to marriage are better explained by the unwillingness of the Trial Chamber and willingness of the Appeals Chamber to accept that a relationship of owner-slave can also be a relationship of husband-wife.

C. What is Marriage?

The Appeals Chamber decision relied in part on the ongoing “conjugal relationship” to distinguish forced marriages from sexual slavery. Putting the emphasis on the victim serving as a “conjugal partner” leads to the question of what a conjugal relationship is. Outside a situation of conflict, this question is less likely to arise. Men and women are married according to the law of that jurisdiction. The question is not, “are they married?” but, “was the marriage forced?” The discussions about forced marriage that have taken place in domestic jurisdictions have wrestled with how to legislate against marriage without consent or by coercion; they have not had to address the definition of marriage.¹⁴⁶ In a setting of war where legal institutions are not operating or in countries where customary practices do not formally record a marriage, before deciding whether or not a marriage is forced, international law first has to answer the question of what a marriage is.

¹⁴⁴ *AFRC Trial Chamber Decision*, Separate Opinion of Justice Doherty, at ¶ 36.

¹⁴⁵ See discussion *supra* Parts II.B, II.C.

¹⁴⁶ See, e.g., HOME OFFICE, A CHOICE BY RIGHT: REPORT OF THE WORKING GROUP ON FORCED MARRIAGE (2000), <http://www.fco.gov.uk/resources/en/pdf/a-choice-by-right> (last visited April 1, 2010); Sara Hossain & Suzanne Turner, *Abduction for Forced Marriage – Rights and Remedies in Bangladesh and Pakistan*, INT’L FAM. L. 15 (2001).

The Trial Chamber offered its definition of a “marital relationship” as one of “mutual obligations inherent in a husband and wife relationship.”¹⁴⁷ The Appeals Chamber’s definition is not clear but seems not dissimilar to the Trial Chamber’s idea of “mutual obligations,” referring to “conjugal duties” the spouses had towards each other (male protection of the female and female subservience to the male).¹⁴⁸

While approaching the question of what a marriage is in broadly similar terms, the two Chambers reached opposite conclusions about whether a marriage existed. The majority of the Trial Chamber, including Justice Sebutinde in a separate concurring opinion, found that the perpetrators’ use of the term “wife” signified an intention to exercise ownership over the victim and not an intent to assume a marital relationship of “mutual obligations.”¹⁴⁹ As Justice Sebutinde said, “the ‘bush husbands’ exercised any or all the powers attaching to the right of ownership over his ‘bush wife’,” and the “bush husbands” forced the “bush wives” “to render gender-specific forms of labor (conjugal duties).”¹⁵⁰ Justice Sebutinde found a relationship of owner-slave, not husband-wife. The Appeals Chamber, however, found that “the perpetrators intended to impose a forced conjugal association rather than exercise mere ownership over civilian women and girls.”¹⁵¹ Therefore, the Appeals Chamber considered a husband-wife relationship to have existed.

Both the Appeals Chamber and Justice Sebutinde, in concurring with the Trial Chamber, cited the same passage of the evidence of Zainab Hawa Bangura, the Prosecution expert, in support of their opposite conclusions.¹⁵² Ms Bangura gave evidence that:

The use of the term “wife” by the perpetrator was deliberate and strategic. The word “wife” demonstrated a rebel’s control over a woman. His psychological manipulations of her feelings rendered

¹⁴⁷ *AFRC Trial Chamber Decision*, at ¶ 711.

¹⁴⁸ *Id.* at ¶ 189.

¹⁴⁹ *Id.* at ¶ 711.

¹⁵⁰ *AFRC Trial Chamber Decision*, Separate Opinion of Justice Sebuntinde, at ¶ 16.

¹⁵¹ *AFRC Appeals Chamber Decision*, at ¶ 192.

¹⁵² *AFRC Trial Chamber Decision*, Separate Opinion of Justice Sebuntinde, at ¶ 13; *AFRC Appeals Chamber Decision*, at ¶ 192.

her unable to deny him his wishes. “Wife” showed that the woman belonged to a man and could not be touched by another.

Justice Sebutinde also noted that having called this evidence, the prosecution did not once refer to it in support of its case,¹⁵³ perhaps because the prosecution apprehended it would undermine the distinction it was seeking to draw between sexual slavery and forced marriage. So how can evidence that “a woman belonged to a man” support two opposite conclusions? The answer must be that while the Trial Chamber was unwilling to recognise an owner-slave relationship as a marriage, the Appeals Chamber was willing to accept, unconsciously at least, that in the Sierra Leone context a relationship of ownership could also be a marriage.

It is difficult to see how the court could avoid the conclusion that the marriage relationships involved some element of owner-slave, but it is also apparent that these relationships can be described as husband-wife relationships in the Sierra Leone context. Karine Bélair asked, “[W]hy was the concept of ‘marriage’ used to refer to the type of union that prevailed between rebels and their captives during the conflict in Sierra Leone?” Her answer was that “‘bush wives’ . . . were required to perform the same functions as wives under customary law: to carry out all the domestic tasks and be sexually submissive. Thus, ‘bush wives’ played the traditional role of wives to the combatants, but under extreme circumstances.”¹⁵⁴

Justice Doherty, who in her partial dissent found the existence of marriage rather than of slavery, came close to acknowledging this when she referred to the defense expert witness’s evidence that the “rights and obligations” of the forced marriages were the same as those “involved in traditional marriages.”¹⁵⁵ The Appeals Chamber, however, failed to explain how the “conjugal association” differed from “mere ownership”: the judges were unwilling to acknowledge that the power of labeling a woman “wife” carries cultural connotations of ownership.

This reluctance might be explained by the tension between the impetus to “enrich the jurisprudence” (understood as a feminist project of advancing women’s rights) and the imperative of maintaining the credibility of international justice. If the court brings into question culturally accepted roles within marriage or local traditions of marriage, it may be seen as

¹⁵³ *AFRC Trial Chamber Decision*, Separate Opinion of Justice Sebutinde, at ¶ 17.

¹⁵⁴ Bélair, *supra* note 99, at 573, 575–576.

¹⁵⁵ *AFRC Trial Chamber Decision*, at ¶ 49.

interfering with traditional practice. This is an interesting tension given that one of the stated aims of the feminist project in prosecuting gender crimes is to “download . . . international law reforms into domestic legal regimes.”¹⁵⁶

The Appeals Chamber, in accepting the use of the term “marriage” when the relationship amounts to ownership (though unacknowledged), may legitimate the idea that marriage involves the subordination of women to men. In this respect it can be criticized for failing to advance the aim of “enriching the jurisprudence” (from a feminist perspective) because the court reinforces a patriarchal view of marriage that puts women at risk of gender-specific violence, not only during conflict, but also during peacetime.

The Trial Chamber, on the other hand, took a more western view of the “mutual obligations inherent in a husband and wife relationship”¹⁵⁷ and accepted that rebels strategically deployed the term “wife” to demonstrate control over the girl or woman and in a way that amounted to slavery. The disadvantage of the Trial Chamber decision is that, in recognizing that the relationship of husband-wife is tantamount to owner-slave, it fails to acknowledge that victims conferred the label of “wife” experience effects that are distinct from those suffered by victims of slavery not given this label. Is there an approach that can negotiate both recognition of the distinct effects of forced marriage without being drawn into recognizing as “marriage” a relationship that is essentially owner-slave?

IV. DEFINING FORCED MARRIAGE: A GENDER-NEUTRAL APPROACH

The impetus for recognizing forced marriage as a separate crime against humanity, distinct from sexual slavery, slavery, or rape, comes from the need to recognize the distinct effect that the conferral of the status of marriage has on the victim.¹⁵⁸ The focus should therefore be on the specific effect of the conferral of the status of marriage. Rape within a forced “marriage,” forced labor, or forced pregnancy can all be prosecuted separately for what they are. Any definition of “forced marriage” as a

¹⁵⁶ Halley et al., *supra* note 13, at 344 (citing as examples comments by ICTY/ICTR Justice Louise Arbour and academic Catherine MacKinnon).

¹⁵⁷ *AFRC Trial Chamber Decision*, at ¶ 711.

¹⁵⁸ Press Release, Special Court for Sierra Leone, The Office of the Prosecutor, Prosecutor Welcomes Arraignment of RUF and AFRC Indictes on Charges Related to Forced Marriage, *supra* note 6; see also CARLSON & MAZURANA, *supra* note 15, at 15–16.

crime must describe a wrong that is currently not addressed in international criminal law if it is to make a real contribution to enriching international jurisprudence.

A. Separating Forced Marriage from Crimes within Forced Marriages

It is tempting to include any criminal acts that occur within a forced marriage among the effects of the conferral of the status of marriage. This was the approach taken by the Appeals Chamber, which found that the physical and sexual violence women suffered formed part of the offense of forced marriage.¹⁵⁹ It is also the approach accepted by Neha Jain in her discussion of the SC-SL decisions, in which she compares forced marriage during the conflicts in Sierra Leone and Cambodia.¹⁶⁰ The temptation stems from the fact that marriage can lead to other crimes because of the culturally mandated roles within marriage. Two examples are rape, because the women and girls were required to have sex with their “husbands,” and forced labor, because in the cultural context women are expected to be domestic servants to their husbands.

The difficulty with labeling what is otherwise sexual slavery, rape, enslavement, and torture as “marriage” is that it distorts and conceals the nature of the victim’s experience. This is highlighted in the Human Rights Watch’s report on sexual violence during the Rwandan genocide.¹⁶¹ The report rejects the use of the terms “forced marriage” and “wives” to describe these women’s experience: “these terms obfuscate the total lack of consent by the women and the coercive conditions under which they were held. These women were in fact captives, looted possessions of the militiamen, held in sexual slavery.”¹⁶²

U.N. Special Rapporteur Gay McDougall has similarly concluded that women supposedly held in “forced marriages” are in fact held in sexual slavery. In discussing “forced marriages” in Algeria and by the Lord’s Resistance Army in Uganda she concluded: “The repeated rape and sexual abuse of women and girls under the guise of ‘marriage’ constitutes slavery,

¹⁵⁹ *AFRC Appeals Chamber Decision*, at ¶ 195 (“While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors.”).

¹⁶⁰ Jain, *supra* note 15, at 1031.

¹⁶¹ HUMAN RIGHTS WATCH, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH*, *supra* note 81.

¹⁶² *Id.*

as the victims do not have the freedom to leave, to refuse the sham 'marriage' or to decide whether and on what terms to engage in sexual activity."¹⁶³

As previously discussed, the power of the term "marriage" and the reason it is used by offenders is that it creates conditions for behaviour that would otherwise be unacceptable. In these marriages, women (or, in Cambodia, women and men) were compelled into sexual relationships and the "spouses" were required to carry out gender-specific labor. If the crimes are not prosecuted separately then the risk is that the perpetrators' aim is achieved—the violence is hidden under the protective cloak of the relationship of marriage, and cultural norms regarding accepted behavior in a marriage are reinforced. With this understanding, what appears on its face to be a victory for the feminist project of recognizing gender crimes is revealed as a step backwards.

Prosecuting enslavement, sexual slavery, forced pregnancy, or rape as separate crimes recognizes the specific nature of those offenses. If these crimes are all instead encompassed in the term "marriage," marriage may be used as a veil for criminal offenses. The power of marriage as an unassailable institution is apparent in the ongoing battle to have marital rape recognised as a crime.¹⁶⁴ Prosecuting forced marriage separately from other forms of sexual violence keeps it from being distorted into a crime of sexual violence against women. As Katherine Franke has argued in her discussion of rape in international criminal law, the singular emphasis on rape against women is "[a] form of overcompensation for the years of ignoring women's place in humanitarian law."¹⁶⁵ She argues that "overcompensation" comes at the price of "[s]exualizing women in ways that fail to capture both the array of manners in which women suffer gross injustice, as well as the ways in which men suffer gendered violence as well."¹⁶⁶ As the Cambodian

¹⁶³ Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, ¶ 13, U.N. Doc. E/CN.4/Sub.2/2000/21 (June 6, 2000) (prepared by Gay J. McDougall).

¹⁶⁴ Feminists lobbying for the recognition of marital rape as a domestic crime had only limited success in the late 1970s; by 1997 only seventeen countries worldwide had outlawed marital rape. Charles J. Ogletree, Jr. & Rangita de Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and the Reality* 13 TEX. J. WOMEN & L. 251, 278 (2004) (citing United Nations Children's Fund [UNICEF], *The Progress of Nations Report of 1997* (1997), available at <http://www.unicef.org/pon97/p48a.htm>).

¹⁶⁵ Franke, *supra* note 13, at 822–23.

¹⁶⁶ *Id.* at 822–23.

example demonstrates, men and women can also be victims of forced marriage without it necessarily involving sexual violence. A definition of forced marriage should recognize this possibility. The Appeals Chamber opinion and Neha Jain's discussion of that opinion accept that forced marriage is not predominately a sexual crime,¹⁶⁷ but the inclusion of sexual violence at all allows this conduct to be veiled by "marriage."

Prosecuting crimes committed within the marriage separately from the crime of forced marriage itself recognizes that the perpetrator of violence within the marriage is not necessarily the person responsible for the forced marriage. In Democratic Kampuchea, the Khmer Rouge, not the spouses themselves, forced the marriage. Similarly, much of the contemporary discussion regarding domestic protection against forced marriage recognizes that third parties—often the parents of the proposed spouses—can be the perpetrators of this offense.¹⁶⁸ Once in the relationship, the victims of a "forced marriage," as the Cambodian example illustrates, can but may not necessarily become perpetrators of violence against their spouses by taking advantage of the coercive environment. That is separate conduct from that which comprises the crime of forced marriage and should be treated as such.

B. A Gender-Neutral Definition of Marriage

The SC-SL prosecutor's definition of forced marriage is adequate to achieve the aim of recognising the specific effects of the conferral of the status of marriage on the victim, whether that victim is male or female. The prosecutor defines forced marriage as:

Words or other conduct intended to confer a status of marriage by force or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against victim, or by taking advantage of a coercive

¹⁶⁷ *AFRC Appeals Chamber Decision*, at ¶ 195; Jain, *supra* note 15, at 1031.

¹⁶⁸ The English case law has many examples of marriages forced on perpetrators by a third party. *See, e.g.,* Parojcic v. Parojcic [1958] 1 W.L.R. 1280 (P.) (The case concerned a father who forced his daughter to marry a fellow Yugoslav after she had escaped from Yugoslavia to live in England. Her father threatened to return her to Yugoslavia if she did not agree to marry the man of his choosing.); *see also* Buckland v. Buckland [1968] P. 296. An Australian example is Di Mento v. Visalli, [1973] 2 N.S.W.L.R. 199, (involving the father of a fourteen year old girl who threatened to kill her if she did not marry her kidnapper).

environment, with the intention of conferring the status of marriage.¹⁶⁹

The words “status of marriage” in this definition needs to be treated with care. Both Chambers of the SC-SL became entangled in looking at the nature and quality of the relationships to decide whether the perpetrator had “conferred the status of marriage.” This led the Appeals Chamber to import a patriarchal definition of marriage into international criminal law, which commentators had cautioned against,¹⁷⁰ by identifying cooking, cleaning, child rearing, and providing sexual gratification as indicators of a “conjugal association.”¹⁷¹ Neha Jain argues that a definition that includes these duties is “gender-neutral.” This assertion accepts without question these gender-specific roles in a marriage. Accepting this definition is troubling because it implies that international criminal law accepts these acts as female marital duties. The Trial Chamber also looked at the “duties” assumed by the respective spouses within the “marriage,” but rather than accepting them as evidence of marriage, the Trial Chamber found these “duties” were evidence of an owner-slave relationship.¹⁷² In failing to recognize the distinct effects of forced marriage on the victim, the majority allowed the offense to be completely subsumed by the crime of sexual slavery.

These problematic aspects of both Chamber’s’ decisions may be corrected simply by requiring only a *subjective* belief in the validity of the marriage from the spouses and their community. Whether a person is in fact bound to someone for life depends not on what their roles are in the “marriage,” but rather on whether they and their community consider themselves so bound. The belief in the marriage of the couple and their community creates the ongoing, lifelong effects, such as difficulty reintegrating into their community,¹⁷³ to which international law previously had no answer. There is no need to look to factors such as co-habitation, sexual relationship, or domestic duties and responsibilities to determine if a marriage exists in the eyes of the victims.

¹⁶⁹ *AFRC Trial Chamber Decision*, at ¶ 585 (citing Prosecution Final Brief at ¶¶ 1009–1012).

¹⁷⁰ Nowrojee, *supra* note 108, at 102.

¹⁷¹ *AFRC Appeals Chamber Decision*, at ¶ 189.

¹⁷² *AFRC Trial Chamber Decision*, at ¶ 711.

¹⁷³ See *supra* notes 88, 90, 94, 98.

If only a subjective belief is required, then even though the relationship amounts to owner-slave, it will still be encompassed by the offense of forced marriage. This gives rise to the criticism discussed above that labeling what is essentially a relationship of owner-slave as a marriage obfuscates the true nature of the relationship and conceals and distorts the victim's experience.¹⁷⁴ The force of that criticism can be reduced by separately prosecuting the crimes that occur under the guise of the marital relationship. The only conduct punished as part of forced marriage would be the conferral of that status and its effects. This would allow international criminal law to address the distinct effects of forced marriage without subsuming other crimes of oppression and sexual violence.

C. Wrestling with Consent and Agency

The next element of the offense that requires examination is the following: what amounts to "force" in a "forced marriage"? Is force actually necessary or is lack of consent sufficient? This question is particularly relevant in cases where the "victims" entered into marriages either seemingly voluntarily or with some degree of agency.

This question has been raised in the context of rape prosecution in international law, where it must be decided whether customary international law requires only proof of lack of consent or if proof of resistance, force, or coercion must be presented.¹⁷⁵ The ICTY and ICTR have found lack of consent to be sufficient to demonstrate rape. The ICTY in *Kunarac* further found that the circumstances in which war crimes or crimes against humanity occur "will be almost universally coercive. That is to say, true consent will not be possible."¹⁷⁶ In the context of a rape prosecution, the prosecution may therefore meet its burden of proof of lack of consent by providing sufficient evidence that the circumstances in which the sexual contact took place were coercive.

The SC-SL Prosecutor's definition of marriage incorporates this broader conception of coercion and consent. His definition includes force, threat of force, or coercion, including "by taking advantage of a coercive environment." This approach recognizes that for many victims the reality of life during conflict, such as that in Democratic Kampuchea and Sierra Leone, meant that what may appear a choice on its face is not genuine

¹⁷⁴ See *supra* Part IV.C.

¹⁷⁵ *Kunarac*, *supra* note 134, at ¶ 460 (Trial Chamber).

¹⁷⁶ *Kunarac*, *supra* note 134, at ¶ 130 (Appeals Chamber).

consent. While some people were subjected to direct physical force or threats of force, others married to ward off starvation or to obtain protection against rape or murder.¹⁷⁷ Justice Doherty referred to the “overwhelming environment of coercion” as an indication that despite obtaining some relative benefit from the marriage, the benefit was not sufficient to prove consent.¹⁷⁸ She also found that a victim’s decision to remain in the marriage does not mitigate the criminality of the original act: “I am of the opinion that a decision to remain in the forced marriage or its transformation into a consensual situation does not retroactively negate the original criminality of the act.”¹⁷⁹

In the context of prosecuting rape, Karen Engle has argued that presuming consent is not possible in certain settings where “consensual sexual relationships [become] legally impossible.”¹⁸⁰ She calls this a troubling reinforcement of “minimization of women’s sexual, political, and military agency.”¹⁸¹ She says that “perpetuating images of women as powerless victims of war might unwittingly function to strip women of many types of power, including the power to resolve or prevent conflict.”¹⁸² The same is true for prosecuting forced marriage.

The risk of ignoring agency has to be balanced against recognizing that what may appear to be “choice” on its face is in reality a strategic decision between two equally unpalatable options, neither of which the person would choose if other options were available. If lack of consent can be inferred, it should be a rebuttable presumption rather than a blanket holding that “consent is not possible.” This acknowledges that there may be situations where, despite the generally coercive circumstances, genuine consent could be and was given.

¹⁷⁷ See *supra* Part I.B..

¹⁷⁸ *AFRC Trial Chamber Decision*, Separate Opinion of Justice Doherty, at ¶ 56.

¹⁷⁹ *AFRC Trial Chamber Decision*, at ¶ 45.

¹⁸⁰ Engle, *supra* note 13, at 804.

¹⁸¹ *Id.* at 807.

¹⁸² *Id.* at 812. This is particularly problematic in a regime that lasted almost four years, where it is highly possible that some civilian women formed consensual sexual relationships with cadres and military.

D. Is It Sufficiently Grave?

If the crime is limited only to the conferral of the status of marriage and its effects, not the atrocities committed within the marriage, the question arises whether it is serious enough to warrant the label of an “inhumane act” alongside other crimes against humanity.

The Appeals Chamber found that forced marriage was sufficiently grave to warrant categorization as an “other inhumane act,” but that finding is based on a mix of physical injury within the marriage and the harm arising from the conferral of the status of marriage. The Chamber referred to women “being subjected to repeated acts of rape and sexual violence, forced labor, corporal punishment, and deprivation of liberty”¹⁸³ as well as the psychological harm:

Many were psychologically traumatised by being forced to watch the killing or mutilation of close family members, before becoming “wives” to those who committed these atrocities and from being labelled rebel “wives” which resulted in them being ostracised from their communities. In cases where they became pregnant from the forced marriage, both they and their children suffered long-term social stigmatisation.¹⁸⁴

The majority of the Trial Chamber considered forced marriage not to be of sufficient gravity to warrant inclusion as a crime against humanity, finding there was no evidence that the declaration of marriage in itself caused trauma:

Not one of the victims of sexual slavery gave evidence that the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental. Moreover, in the opinion of the Trial Chamber, had there been such evidence, it would not by itself have amounted to a crime against humanity, since it would not have been of similar gravity to acts referred to in Article 2(a) to (h) of the Statute.¹⁸⁵

Notably, the Trial Chamber’s decision on this point is, by their own admission, mere conjecture; they draw a conclusion from evidence they say

¹⁸³ *AFRC Appeals Chamber Decision*, at ¶ 199.

¹⁸⁴ *Id.*

¹⁸⁵ *AFRC Trial Chamber Decision*, at ¶ 710.

they have not heard. It is apparent from the opinions of Justice Doherty, as well as that of the Appeals Chamber, that the Trial Chamber majority had in fact heard evidence on the effects of the conferral of the status of marriage.¹⁸⁶ In her partial dissent, Justice Doherty referred specifically to this evidence, explaining that in the case of the Sierra Leone conflict:

Serious psychological and moral injury follows “‘forced marriage’[.]” Women and girls are forced to associate with and in some cases live together with men who they may fear or despise. Further, the label “‘wife’” may stigmatise the victims and lead to their rejection by their families and community, negatively impacting their ability to reintegrate into society and thereby prolonging their mental trauma.¹⁸⁷

In Sierra Leone, women and girls held as sexual slaves but not labeled “bush wife” or “rebel wife” did not suffer from this ongoing stigma.¹⁸⁸ Justice Doherty emphasized that “‘forced marriage’ does not necessarily involve elements of physical violence such as abduction, enslavement or rape, although the presence of the elements may go to proof of the lack of consent of the victim. The crime is concerned primarily with the mental and moral suffering of the victim.”¹⁸⁹

That suffering, she said, was “inherently subjective,” necessitating that the personal circumstances and cultural environment of the victim be taken into account.¹⁹⁰

Taking the SC-SL’s comments on the effects of forced marriage together with the observations on the effects of forced marriage on the Cambodian victims interviewed, it is possible to compile a list of effects on the victim of the forced marriage that are specific to the conferral of that status, without including conduct within the marriage:

¹⁸⁶ *AFRC Trial Chamber Decision*, Separate Opinion of Justice Doherty, at ¶ 22–48; *AFRC Appeals Chamber Decision*, at ¶ 192.

¹⁸⁷ *AFRC Trial Chamber Decision*, Separate Opinion of Justice Doherty, at ¶ 48.

¹⁸⁸ *Id.* at ¶ 50.

¹⁸⁹ *Id.* at ¶ 52.

¹⁹⁰ *AFRC Trial Chamber Decision*, Separate Opinion of Justice Doherty, at ¶ 56.

- 1) Trauma caused by the acts to coerce the victim into marriage, for example: abduction, murder, rape, physical violence, or threats of violence against the victim or her family;
- 2) Binding the victim for life to a person who has committed serious crimes against the victim and/or the victim's family to facilitate the victim's abduction or to coerce the victim into marriage;
- 3) Binding the victim for life to a person who has committed serious crimes, such as rape, slavery, torture, or forced child-bearing, against him or her in the course of the marriage;
- 4) Depriving the victim(s) of the opportunity for consensual marriage (including those arranged in accordance with cultural tradition) as a pivotal life decision and event and the corresponding emotional damage to the victim;
- 5) Having the responsibility of bringing up a child of the marriage, including children from forced pregnancies with a genocidal motive;
- 6) Ostracizing the victim from the community by creating the assumption that the victim is colluding with or associating with "the enemy";
- 7) Denying the victim property rights as a result of the marriage in accordance with the domestic law of the country.¹⁹¹

As Justice Doherty held in the case of the Sierra Leone conflict, the acts to which rebels subjected girls and women in order to secure a "marriage" and the lasting effects for these victims are sufficiently grave for forced marriage to be a crime against humanity.¹⁹²

The factors present in the Sierra Leone conflict, such as the ostracism from the community as a result of the marriages or the wife being bound to a husband who had raped and tortured her, are mostly absent in the Cambodian example. Unlike in the Sierra Leone conflict, it was more

¹⁹¹ Meredith Turshen and Clotilde Twagiramariya reported use of forced marriage to obtain the woman's assets in the Rwandan genocide. Meredith Turshen & Clotilde Twagiramariya, *'Favours' to Give and 'Consenting' Victims The Sexual Politics of Survival in Rwanda*, in *WHAT WOMEN DO IN WARTIME: GENDER AND CONFLICT IN AFRICA* 101, 112 (1998).

¹⁹² *AFRC Trial Chamber Decision*, Separate Opinion of Justice Doherty, at ¶ 71.

often the case that both spouses were victims of the government's crime. For Cambodians, the ongoing effect of the conferral of the status of marriage lies more in the brutality used to coerce marriage and the pain and hurt resulting from the deprivation of what was a pivotal ceremony and celebration in Cambodian culture. For the people interviewed, this pain was so deep that they carried the scars of it with them some thirtie years after the event. Many of the interviewees were at pains to discuss not only the marriages and sexual violence that were the intended subject of the interviews but also the overwhelming memories of hunger and of fear. They told stories of the deaths of relatives by execution or starvation, experiences of torture, hard labor, and physical violence. Forced marriage could start to pale against these memories. The extreme violence, including brutal sexual violence, to which the Khmer Rouge subjected some people in order to coerce them into marriages brings the gravity of this crime back into relief. At the same time, this violence should not completely obscure the fact that the forced marriages have also had a lasting effect on the victims because, once married, most felt that cultural expectations required them to remain in those marriages regardless of their desire to do so. The Khmer Rouge policy of forced marriage changed the course of thousands of lives.

E. Remaining in a Forced Marriage

It is worth pausing to consider what a finding that a marriage is forced means for those who remain in that marriage. A spouse may stay in the marriage for a range of reasons, often related to cultural expectations. In the SC-SL, expert witnesses gave evidence that the reasons for victims remaining in the marriages included "an inability to find an alternative life style, an obligation to rear the children born of the forced marriage, rejection by their family or community or acceptance of their lot."¹⁹³ Human Rights Watch reported the story of a Rwandan woman who remained with her "husband" after the genocide.¹⁹⁴ A member of the militia had taken her and raped her before a more senior militia member exercised his rank and took her as his "wife." When Human Rights Watch interviewed her she was still living with him, and they had a nine-month-old child:

¹⁹³ *AFRC Trial Chamber Decision*, Separate Opinion of Justice Doherty, at ¶ 45.

¹⁹⁴ HUMAN RIGHTS WATCH, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH*, *supra* note 81.

I still live with him, and I think of him as my husband because he gives me food and lodging. Every day [during the genocide], he told me that he would kill me. He worked at a roadblock during the genocide. But no one has accused him yet. When I realized I was pregnant, I thought that I had to accept it because it came from God. Now I am the only Tutsi living here. Once I fled to Gikongoro, but he followed me there and brought me back. Maybe he loves me or he would not have followed me. As long as he does not want to kill me, I will stay with him because I could not find another husband. His brother tells him that he should not live with a Tutsi—that he should kill me. But he said he would not. I do not think that he wants to kill me anymore. My mother-in-law lives with us. She always tells me “You Tutsi girls, you are too proud.” I must accept him—God sent him.¹⁹⁵

In Cambodia, many of the marriages contracted under the Khmer Rouge endured and many of the people interviewed during the course of the Study are either still married to the spouse the *Angkar* forced them to marry or remained so until their spouse’s death. As Patrick Heuveline and Bunnak Poch found in their study of stability in Cambodian marriages, marriages contracted under the Khmer Rouge were as stable as marriages in the post-Khmer Rouge period. They concluded that “marriages relatively quickly ‘forget their past.’”¹⁹⁶ The question of the effect of a finding of forced marriage is therefore potentially important to many of the victims of forced marriage.

So what does that mean for the marriage? Is it void because legally it never came into existence, meaning no formal declaration is required to end it, or is it voidable such that it continues until a party petitions to have it declared a nullity on the basis of lack of consent? Alternatively, does the marriage remain valid such that it may only be terminated by formal divorce proceedings? The validity of a forced marriage can have serious implications for those still living in the marriages. It can affect the parties’ emotional wellbeing as well as rights to property, custody of children, succession, or other rights according to the domestic law of a country. While these concerns fall outside the compass of international criminal law, they have real implications for those who continue to live with the spouse they were forced to marry and are potentially difficult questions with which transitional justice systems would have to wrestle.

¹⁹⁵ *Id.*

¹⁹⁶ Heuveline & Poch, *supra* note 11, at 117–118.

V. CONCLUSION

The introduction of forced marriage as a crime against humanity by the SC-SL offers a potential means of redress for those who have been subjected to the practice of “forced marriage” during conflict.

In the case of the ECCC, where prosecutions for crimes committed by the Khmer Rouge are currently underway, the recognition of forced marriage as an “other inhumane act” presents an opportunity for addressing the practice of forced marriage. The Khmer Rouge forced thousands of Cambodian men and women into marriages as part of their policy to destroy the family group while still maintaining population growth. Any individual who dared to resist the “marriage” was coerced by violent means, including, in the case of female victims, through sexual violence, if they dared to resist the marriages. While the Khmer Rouge appropriated the traditional practice of parents arranging a marriage by claiming the status of parent for *Angkar*, they in fact deprived the victims of forced marriage of the traditional family participation and celebration in the event. Many of these marriages endure today, often not out of free choice but because the victims experience a lack of alternatives, the force of cultural expectations, or a hopeless resignation to the situation in which they find themselves. The ECCC Statute, like that of the SC-SL, allows for prosecution of crimes against humanity including “other inhumane acts.”

The prosecution of Khmer Rouge crimes in the ECCC will concentrate on crimes of torture, starvation, forced labor, and murder—crimes that will be forever associated in the public mind with the Khmer Rouge. Due to the limitations of the ECCC’s jurisdictions and resources, prosecution of this specific offense is likely to be overlooked despite the gravity of the harm forced marriage caused to a large number of Cambodians. One of the purposes of prosecution after mass violence is to create an historical record of the crimes that were committed.¹⁹⁷ The introduction of evidence regarding forced marriage, even if it is not for the purposes of prosecuting the crime individually, is important to creating a complete record, not one distorted by the restrictions of jurisdiction, political imperatives, and resources. The record of Khmer Rouge crimes would then reflect that forced marriages were traumatic events, which deeply affected thousands of Cambodian’s lives.

In the SC-SL, the addition of forced marriage as a separate offense to the AFRC indictment was part of the larger feminist project of

¹⁹⁷ MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 240–292 (1997); Nowrojee, *supra* note 108, at 105.

recognizing and addressing gender crimes. The aims of this larger project cannot be achieved if the court collapses crimes that occur within the marriages, such as rape, sexual slavery, slavery, or torture, into the prosecution of forced marriage. Allowing these crimes to be included in the definition of the offense of forced marriage is a sort of victory for the perpetrators of the crime. Illegal conduct is shielded behind the protective walls of the institution of marriage, a practice feminism has railed against. Forced marriage and violence within the marriage are separate offenses that need separate recognition.

If the SC-SL is to achieve its aim of “enriching the jurisprudence of international criminal law,”¹⁹⁸ the separate crime of forced marriage must address a wrong that currently has no remedy. The SC-SL’s attempts to distinguish the wrong of “forced marriage” from the wrong of “sexual slavery” are less than convincing. The binding effect of a marriage is not reliant on the assumption of certain “traditional” marital roles. People become “married” in the relevant sense for the definition of the crime of forced marriage proposed in this Article when they and the community in which they live believe them to be so. This subjective belief in the existence of a marriage, combined with that marriage’s grave effects, should give rise to a colorable claim of forced marriage as a crime against humanity. It is the specific implications forced marriage has for its victims that need a remedy. These include the acts of violence used to coerce the victim into marriage, the reality that a marriage means being bound to someone else for the rest of the victim’s life, and the possibility of ongoing alienation from the victim’s community as a result of the perception that they are tainted by consorting with the enemy. Examining the roles assumed within the marriage only opens the door to inadvertently reinforcing patriarchal definitions of marriage. Some commentators have criticized the failure to recognize women’s agency implied by labeling women as “victims” when prosecuting crimes against women in international law. It is important to acknowledge that there are elements of agency in the marriages that took place and that in some circumstances people have married freely. At the same time, that recognition must be balanced against the common reality that the decision to marry was not freely made, but rather a “choice” of the lesser of two repugnant alternatives. The court should infer lack of consent in the appropriate circumstances but remain open to the possibility that genuine consent might be possible, even in times of conflict. The effects are of sufficient gravity, both in the Sierra Leone and Cambodian examples, to warrant prosecution of forced marriage as a crime against humanity. The

¹⁹⁸ *AFRC Appeals Chamber Decision*, at ¶ 181.

finding of forced marriage can help to publicly shift the blame away from the women forced into the marriages, to provide some measure of redress, and to serve as a public acknowledgement of a wrong committed at the outset of the relationship, even though that relationship might endure.