

## MEMORANDUM

TO: Anne Heindel, Legal Advisor, Documentation Center of Cambodia  
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DATE: Sept. 22, 2010  
RE: Charging Forced Marriage as a Crime Against Humanity

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## I. Historical Background

During the temporal jurisdiction of the ECCC, the Khmer Rouge (“KR”) systematically arranged marriages for men and women throughout Democratic Kampuchea (“DK”). Although some men arranged marriages<sup>1</sup> with women of their choice by speaking with their village chief,<sup>2</sup> most men<sup>3</sup> and women had no choice<sup>4</sup> as to their partner. Refusing to marry “could have resulted in torture, imprisonment or death.”<sup>5</sup>

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<sup>1</sup> Some people were permitted to choose a spouse. “[T]here were stories of local leaders allowing love matches, at least amongst base people . . . . 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.” However, even these people were still subject to group ceremonies and separation. Bridgette A. Toy-Cronin, *What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime Against Humanity*, 19 COLUM. J. GENDER & L. 539, 552 (2010).

<sup>2</sup> But even people with high social standing were not immune from being forced into marriage. KALYANEE MAM, *DEMOCRATIC KAMPUCHEA (1975-1979): WOMEN AS TOOLS FOR SOCIAL CHANGE* 55 (2000) (highlighting that one of her interviewees, a village chief, was forced to marry).

<sup>3</sup> In the Cambodian context, as opposed to the forced marriages that took place in Sierra Leone, men were also often forced into marriage. One former Khmer Rouge soldier who challenged Angkar when he was ordered to get married was taken to prison. NAKAGAWA KASUMI, *GENDER-BASED VIOLENCE DURING THE KHMER ROUGE REGIME: STORIES OF SURVIVORS FROM THE DEMOCRATIC KAMPUCHEA (1975-1979)*, at 17 (2d ed. 2008). Women in power also forced men to marry. One female village chief forced a man to marry her. The man did so to save his and his family’s life. The two are still currently married. Interview with Youk Chhang, Director, Documentation Center of Cambodia (DC-Cam), in Phnom Penh (Aug. 11, 2010). *See also* Toy-Cronin, *supra* note 1, at 543 (“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.”).

<sup>4</sup> “[A]rranged couple[s] could not refuse; if they did, they were sure to be killed. Fifty-five year old Pang Houn, a former soldier, further emphasized that refusal meant death, as in the case of his friend's brother who was executed because of his objection to marriage.” Sok-Kheang Ly, *Love and Marriage under the Khmer Rouge Regime*, *SEARCHING FOR THE TRUTH* 27, 28 (2007), [http://www.dccam.org/Projects/Magazines/Image\\_Eng/pdf/3rd\\_Quarter\\_2007.pdf](http://www.dccam.org/Projects/Magazines/Image_Eng/pdf/3rd_Quarter_2007.pdf).

<sup>5</sup> KASUMI, *supra* note 3, at 18.

These marriage ceremonies consisted of no fewer than three couples and could be as large as 160 couples.<sup>6</sup> Generally, the village chief or a senior leader of the community would approach both parties and inform them that they were to be married and at the time and place the marriage would occur.<sup>7</sup> Often, the marriage ceremony would be the first time the future spouses would meet.<sup>8</sup> Parents and other family members were not allowed to participate in selecting the spouse or to attend the marriage ceremony.<sup>9</sup> The Khmer Rouge maintained that parental authority was unnecessary because it “w[as] to be everyone’s ‘mother and father.’”<sup>10</sup>

The marriage ceremonies had many similarities throughout DK. A KR leader officiated the ceremony.<sup>11</sup> The leader told couples to join hands and to swear to commit to their spouse for life.<sup>12</sup> Then he announced that the couples were married and their names were noted in a registry.<sup>13</sup> After the ceremony, couples were made to live together

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<sup>6</sup> See MAM, *supra* note 2, at 61; accord PEG LEVINE, A CONTEXTUAL STUDY INTO THE WEDDINGS AND BIRTHS UNDER THE KHMER ROUGE: THE RITUAL REVOLUTION 4 (2007). However, note that weddings could be larger with one man reporting that he married “in a group of 300 couples in Kandal province.” LEVINE, *supra* at 119.

<sup>7</sup> See KASUMI, *supra* note 3, at 18.

<sup>8</sup> Neha Jain, *Forced Marriage as a Crime Against Humanity*, 6 J. INT’L CRIM. JUST. 1013, 1024 (2008).

<sup>9</sup> *Id.* at 1023; see also LEVINE, *supra* note 6, at 9 (describing a situation where a father and daughter were both killed when the father refused to allow his daughter to marry). “Another woman explained that her parents did not know about the wedding and were not allowed to attend.” Toy-Cronin, *supra* note 1, at 549.

<sup>10</sup> KHAMBOLY DY, A HISTORY OF DEMOCRATIC KAMPUCHEA (1975-1979), at 2; see also Jain, *supra* note 8, at 12.

<sup>11</sup> See Jain, *supra* note 8, at 1024.

<sup>12</sup> “The couples then had to stand up and announce, “I voluntarily accept him [or her] forever.” Sok-Kheang Ly, *supra* note 4, at 2. Couples were also required “to shake hands after the Khmer Rouge ceremony . . . which displaced their traditional greeting of pressing their hands together.” LEVINE, *supra* note 6, at 49.

<sup>13</sup> Videotape: *Death and Rebirth* (Germany) (1980); but see Toy-Cronin, *supra* note 1, at 548 (“The marriages do not seem to have followed any formal registration procedures,

for varying periods of time from one day to a week at most.<sup>14</sup> During this time, some couples reported that the KR expected them to consummate the marriage<sup>15</sup> so that the wife would grow the ranks of the revolution<sup>16</sup> through childbirth.<sup>17</sup> After living together for a period, husbands and wives were frequently separated into their respective work units and only allowed to visit at times approved by the KR.<sup>18</sup>

Many atrocities were inflicted on the DK population during the KR regime's rule, but not every atrocity is punishable under international criminal law. International law has increasingly recognized<sup>19</sup> gender-based crimes such as rape, enforced prostitution,

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with only one interviewee reporting that she had been required to thumbprint a document recording the marriage.”).

<sup>14</sup> KASUMI, *supra* note 3, at 20; LEVINE, *supra* note 6, at 9; Toy-Cronin, *supra* note 1, at 552; MAM, *supra* note 2, at 56.

<sup>15</sup> Expectations varied by region. Peg Levine's study questioned couples about whether they were under the impression that the KR wanted them to consummate their marriage. *See generally* LEVINE, *supra* note 6.

<sup>16</sup> *See* Jain, *supra* note 8, at 1025; *see also* Toy Cronin, *supra* note 1, at 552.

<sup>17</sup> However, the KR did not create an environment conducive to childbirth. People were too tired to engage or preoccupied with worry to engage in sexual activity. Even when women did become pregnant, starvation and exhaustion could prevent them from carrying their baby to term. *See* LEVINE, *supra* note 6, at 19. One interviewee who said her village leaders spied on her and her husband to see if they were having sexual relations, reported that she did not have children during the DK. When her village leaders asked her why they did not have children, she told them that she had no strength to have children. She also shared that none of the ten couples who were married in her group had children because they were not satisfied with their arrangements. Interview with Mrs. Chheum Chansy, survivor of forced marriage/farmer, in Pursat Province (June 13, 2010).

<sup>18</sup> Many married couples were not granted any special visiting privileges. They were subjected to the same problems of visiting as people who wanted to visit family members. *Compare* Interview with Mr. Nherk Morm, survivor of forced marriage, in Pursat Province (June 12, 2010) (highlighting that visitation privileges were the same for everyone—married, non-married, and families with children), *with* MAM, *supra* note 2, at 54-55 (asserting that the KR only married those whose labor had been exhausted and that they assigned married couples to special marriage units where their work was less strenuous).

<sup>19</sup> *See generally* Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21

sexual violence and sexual slavery as crimes against humanity.<sup>20</sup> Nevertheless, it is questionable whether these gender-based crimes capture the harm that forced marriage inflicted upon men and women during DK or if there is a gap in international law “necessitat[ing] a separate crime of forced marriage as an ‘other inhumane act.’”<sup>21</sup>

## II. The Harms of Forced Marriage

Before the KR regime, arranging marriages was a family affair. Mothers and fathers went through great pains to find an appropriate spouse for their sons and daughters.<sup>22</sup> Parents researched the age of potential spouses, their social status and other factors to carefully analyze the probable stability of the match.<sup>23</sup> Marriage ceremonies lasted three days<sup>24</sup> and were festive occasions with all of the bride and groom’s relatives

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BERKELEY J. INT’L L. 288 (2003) (detailing the increased prosecution and recognition of gender-based crimes).

<sup>20</sup> The ECCC has jurisdiction over crimes against humanity including rape and other inhumane acts. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 5 [hereinafter ECCC Law]. The Special Court for Sierra Leone is the only tribunal that has recognized forced marriage as a crime against humanity. AFRC Case, Case No. SCSL-2004-16-A, Judgment, ¶¶ 195-203 (Feb. 22, 2008), <http://www.scsl.org/LinkClick.aspx?fileticket=6xjuPVYy%2fvM%3d&tabid=173>.

<sup>21</sup> AFRC Case, Case No. SCSL-2004-16-A, Judgment, ¶ 176 (Feb. 22, 2008), <http://www.scsl.org/LinkClick.aspx?fileticket=6xjuPVYy%2fvM%3d&tabid=173>.

<sup>22</sup> “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 the bride's and groom's respective birth timing.’” Toy-Cronin, *supra* note 1, at 546-47 (quoting Patrick Heuveline & Bunnak Poch, *Do Marriages Forget their Past? Marital Stability in Post-Khmer Rouge Cambodia*, DEMOCRACY, Feb. 2006, at 99).

<sup>23</sup> Patrick Heuveline & Bunnak Poch, *Do Marriages Forget their Past? Marital Stability in Post-Khmer Rouge Cambodia*, DEMOCRACY, Feb. 2006, at 101.

<sup>24</sup> KASUMI, *supra* note 3, at 18.

and villagers celebrating together.<sup>25</sup> Pre-KR arranged marriages stand in stark contrast to the forced marriages that took place under the KR regime. During the DK period, multiple couples were married at abrupt somber ceremonies without family present and generally with no forms of celebration following the event.<sup>26</sup> Women and men who were forced into marriage were deprived of family input, consent<sup>27</sup> and celebration.<sup>28</sup>

Because the KR haphazardly forced people to marry without taking into account compatibility, couples were sometimes severely ill-matched. For example, a university educated girl named Moni, who stayed with her husband after the fall of the KR complained: “My husband and I can’t speak about things that matter, I am university educated and he has only a primary school education;<sup>29</sup> he does not agree with me regarding the education of our children. He thinks they should find work and forget about school.”<sup>30</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> See LEVINE, *supra* note 6, at 51-59.

<sup>27</sup> Although some families may have coerced daughters to marry for the benefit of the family most arranged marriages would not proceed the daughter’s consent. Forcing daughters to marry was discouraged. Heuveline & Poch, *supra* note 23, at 101; see also Toy-Cronin, *supra* note 1, at 547 (“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. 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. The basic institution therefore envisioned consensual arranged marriage.”).

<sup>28</sup> See Toy-Cronin, *supra* note 1, at 547.

<sup>29</sup> Although in traditionally arranged marriages, parents tried to match boys with girls from a slightly higher social background in traditionally arranged marriages, Moni’s marriage represents an extreme gap in the social backgrounds of a husband and wife. See LEVINE, *supra* note 6, at 116.

<sup>30</sup> *Id.* at 116. Couples may have also differed greatly in age and women were sometimes forced to marry KR soldiers who were disabled. These women therefore had the enormous task of taking care of a disabled husband. MAM, *supra* note 2, at 61 (observing

Although many couples married during the DK “fe[lt] anger and resentment at being forced to marry,”<sup>31</sup> many also felt obligated to stay with their spouse after the fall of the KR.<sup>32</sup> After making a formal commitment<sup>33</sup> to be with their partner for life, many men and women faced what they perceived to be insurmountable cultural barriers.<sup>34</sup> Couples were seen as married by the community and divorce was socially unacceptable.<sup>35</sup>

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that “[d]uring that period it was common for women to be forced to marry soldiers with an amputated arm or leg”).

<sup>31</sup> Toy-Cronin, *supra* note 1, at 543.

<sup>32</sup> Some people chose to stay with their partners for other reasons some of which include: “(1) A spouse witnessed her/his partner’s true compassionate character at the worst of times . . . (2) One has an alliance and emotional tie with a deceased family member . . . (3) A couple shared a village in younger years and the region coincided with family recognition and place recognition . . . (4) One expected to die but did not, which signified good fortune from association with spouse.” LEVINE, *supra* note 6, at 114-15.

<sup>33</sup> Marriages under the KR were “considered authentic.” *Id.* at 101. The formal commitments that took place during the Khmer Rouge era were markedly different from many of the forced marriages that took place during the conflicts in Sierra Leone, Rwanda and Uganda. In some cases, a few witnesses reported a formal commitment. *See* AFRC Case, Case No. SCSL-04-16-T, Judgment, ¶ 712 (June 6, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=vjmJCKSU01E%3d&tabid=173>. However, many witnesses were merely declared wives. In Rwanda, one woman “testified that a member of the Interahamwe, the Hutu militia group, spared her life by claiming her as his wife. The Interahamwe took this woman, witness NN, with a group of several hundred women and children to a hold near the bureau communal where they planned to kill them. Rafiki, a member of the Interahamwe, picked witness NN out of the group saying that she was his wife. Although this act spared NN’s life, it did not spare her from sexual violence.” Rafiki later locked NN in his home and allowed other men to enter the house to rape her. Monika Satya Kalra, *Forced Marriage: Rwanda’s Secret Revealed*, 7 U.C. DAVIS J. INT’L L. & POL’Y 197, 202 (2001) (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 435-36 (Sept. 2, 1998)), <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

<sup>34</sup> *See also* Toy-Cronin, *supra* note 1, at 555 (noting that some women decided to stay in their marriages because of “the influence of cultural norms against separation). Before the DK regime, a divorced woman was not considered “a good woman.” Therefore, wives who were forced to marry and whose husbands died were less likely to remarry. Although today people in Cambodia divorce publicly, divorce is still not culturally acceptable. Interview with Youk Chhang, Director, Documentation Center of Cambodia (DC-Cam), in Phnom Penh (Aug. 11, 2010).

<sup>35</sup> “In the case of Cambodia, due to the formal public ceremony of marriage, couples considered themselves unable to marry other people; they were considered married in the

Moni,<sup>36</sup> whose father died<sup>37</sup> during DK refused to divorce because her father was not around for her “to ask his advice . . . [and] to speak with him about her unhappiness or to ask his permission for her to separate.”<sup>38</sup> Other couples remained together because they believed it provided stability for the children that resulted from the forced wedlock.<sup>39</sup> Still others, who found themselves with few resources following the collapse of the regime, resigned themselves<sup>40</sup> to their marriages due to lack of financial resources and protection.<sup>41</sup>

Even if men and women overcame the cultural difficulties and separated from their spouse after the fall of the KR, they still had to contend with the ongoing consequences of the forced marriage.<sup>42</sup> One man learned from a friend that his wife from

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eyes of the community; and in part due to the practice of divorce being frowned upon in Cambodia, most marriages survived even after the end of hostilities.” *See Jain, supra* note 8, at 1026.

<sup>36</sup> This is the same Moni who was forced to marry a man who did not share her educational values. Moni’s story is further complicated in that she fell in love with a Khmer Rouge soldier after she was forced into marriage. The soldier would sneak her food when she was ill. She maintained contact with the soldier by letter for at least two and a half decades even though he migrated to North America after the fall of the Khmer Rouge. LEVINE, *supra* note 6, at 3.

<sup>37</sup> *See id.* at 116. “Honouring the dead was tied to the remorse in not being able to go back and make a plea to the deceased.” *Id.*

<sup>38</sup> *Id.* at 115. Moni’s commune chief arranged her marriage and her father asked her to obey the commune chief so that he would not be killed “as they [had] already hurt him three times.” *Id.* at 116.

<sup>39</sup> *Id.* at 115. One woman who was forced to marry managed to distance herself from her husband while the KR was still in power, but before the KR fell she discovered that she was pregnant. She then decided that she didn’t want to be separated from her husband anymore because she didn’t want her children to be fatherless. Toy-Cronin, *supra* note 1, at 555

<sup>40</sup> “Many still remain in these forced marriages some thirty years after the fall of the regime and continue to feel anger and resentment at being forced to marry.” *Id.* at 543-44.

<sup>41</sup> LEVINE, *supra* note 6, at 115; *see also* Toy-Cronin, *supra* note 1, at 555 (noting that some women stayed married out of “financial necessity [and] a need for protection”).

<sup>42</sup> *See* Toy-Cronin, *supra* note 1, at 544.

the DK era had a daughter who was his child.<sup>43</sup> Fifteen years after the KR forced them to marry, the husband embarked on a trip to find his ex-wife and his daughter.<sup>44</sup> After finding both, the man began to send his ex-wife money for his daughter.<sup>45</sup> This arrangement created tension between him and his second wife.<sup>46</sup>

Men and women who were forced to marry suffered many mental and psychological harms. Victims were: 1) Deprived “of the opportunity for consensual marriage . . . as a pivotal life decision;”<sup>47</sup> 2) submitted to violent or oppressively coercive measures to enter the marriage; 3) responsible for raising children resulting from the forced marriage;<sup>48</sup> and 4) forced into an ongoing intimate relationship<sup>49</sup> that affected their lives in various ways even if they separated after the fall of the KR.

### **III. The Elements of Forced Marriage**

In Cambodia, forced marriage occurred when “a perpetrator through his words or conduct, . . . [,] compel[led] a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or . . . mental or psychological injury to the victim.”<sup>50</sup> Therefore, to demonstrate that forced marriage occurred the Prosecution

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<sup>43</sup> LEVINE, *supra* note 6, at 101.

<sup>44</sup> *Id.* at 101.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Toy-Cronin, *supra* note 1, at 585.

<sup>48</sup> *Id.*

<sup>49</sup> Note however that under the KR, relationships and intimacy were completely redefined. The KR wanted nothing to compete with its authority. To this end, they completely restructured family life eradicating the possibility of strong family ties and intimacy. Husbands, wives and family members were not permitted to see each other freely or to openly express warmth to each other. *See generally* MAM, *supra* note 2 (describing the control that the KR exercised over every aspect of citizens’ lives in order to weaken traditional social structures that competed with the DK for citizens’ loyalty).

<sup>50</sup> AFRC Case, Case No. SCSL-2004-16-A, Judgment, ¶ 195 (Feb. 22, 2008), <http://www.scsl.org/LinkClick.aspx?fileticket=6xjuPVYy%2fvM%3d&tabid=173>.

should establish three elements: 1) force, threat of force or coercion; 2) a conjugal association; and 3) severe suffering, or mental or psychological injury to the victim.<sup>51</sup>

#### **A. Element 1: Compelled by Force, Threat of Force or Coercion**

The Khmer Rouge controlled the country by severely punishing individuals for even minor infractions.<sup>52</sup> In this environment, many people felt powerless to oppose KR orders. Although some people refused orders to marry multiple times,<sup>53</sup> some of these same people eventually acquiesced.<sup>54</sup> Others who refused were merely fortunate enough to avoid a punishment as severe as death.<sup>55</sup> In this oppressive environment, many individuals undoubtedly agreed to marry out of fear. Therefore, one should consider the repressive environment that the KR created when establishing the element of coercion.

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<sup>51</sup> *See id.*

<sup>52</sup> People dying of starvation could be imprisoned and tortured for seeking extra food for themselves and their loved ones. “[I] was jailed and tortured when I tried to find vegetables for one of my sisters who was pregnant and starving . . . .” Youk Chhang, *How Did I Survive the Khmer Rouge*, DOCUMENTATION CENTER OF CAMBODIA (Apr. 17, 2005), <http://www.dccam.org/Survivors/53.htm>. Even “Displays of affection were punishable moral offenses . . . .” Sok-Kheang Ly, *supra* note 4, at 28. “My mother was afraid to cry when she witnessed the cadres beating me because the Khmer Rouge also thought that expressing grief was a crime.” KHAMBOLY DY, A HISTORY OF DEMOCRATIC KAMPUCHEA (1975-1979): STUDENT WORKBOOK 11 (2009), [http://www.dccam.org/Projects/Genocide/pdf/Student\\_Workbook\\_Eng.pdf](http://www.dccam.org/Projects/Genocide/pdf/Student_Workbook_Eng.pdf).

<sup>53</sup> One woman refused to marry twice and made suicide attempts to avoid the proposed marriages. She accepted the third marriage proposed by the chief. LEVINE, *supra* note 6, at 8. An interviewee shared that she refused to marry and was then placed in a job that was more strenuous—working with rocks. She recognized that her job reassignment was a warning not to refuse to marry again. Interview with Mrs. Chheum Chansy, survivor of forced marriage/farmer, in Pursat Province (June 13, 2010). Another interviewee refused to marry his wife two times despite his unit chief’s attempts to persuade him. The third time he agreed because he was afraid he would be killed for refusing. Interview with Mr. Nherk Morm, survivor of forced marriage, in Pursat Province (June 12, 2010).

<sup>54</sup> *Supra* note 53.

<sup>55</sup> Some people who had good relationships with their village chief were able to avoid many hardships, one of which was forced marriage. Interview with Youk Chhang, Director, Documentation Center of Cambodia (DC-Cam), in Phnom Penh (Aug. 11, 2010).

Such an environment should be prima facie evidence that victims of forced marriage during the DK could not freely give consent.<sup>56</sup>

In *Prosecutor v. Kunarac*, the ICTY observed that some environmental factors are so coercive that victims are incapable of giving genuine consent. In *Kunarac*, the accused were charged with enslavement and rape for holding a number of women captive for varying periods of time.<sup>57</sup> The trial chamber broadly interpreted<sup>58</sup> coercion as encompassing “most conduct which negates consent”<sup>59</sup> thus evaluating the victims’ ability to consent within the context of their surroundings.

The victims in *Kunarac* were repeatedly raped<sup>60</sup> and beaten by their captors and others. They were also forced to perform household duties such as cooking, cleaning and washing clothes.<sup>61</sup> Analyzing the victims’ coercive environment, the trial chamber concluded that although the women were given keys to the house at some point<sup>62</sup> and that even though the door of the house was sometimes left open creating an opportunity to escape, the women were psychologically incapable of escaping. Fear of their captors and

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<sup>56</sup> See generally *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 436-64 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (outlining the elements of rape and analyzing the role of consent and a victim’s ability to voluntarily consent based on their environment), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

<sup>57</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

<sup>58</sup> “Given that it is evident from the Furundžija case that the terms coercion, force, or threat of force were not to be interpreted *narrowly* and that coercion in particular would encompass *most* conduct which negates consent, this understanding of the international law on the subject does not differ substantially from the Furundžija definition.” *Id.* ¶ 459 (first emphasis added).

<sup>59</sup> *Id.*

<sup>60</sup> They were also “forced to take off their clothes and to dance naked on a table.” *Id.* ¶ 766.

<sup>61</sup> *Id.* ¶ 68.

<sup>62</sup> *Id.* ¶ 740.

the inability to find refuge left the women with no choice but to stay with their captors and be subjected to sexual violence.<sup>63</sup>

In *Prosecutor v. Krnojelac*, the ICTY also recognized that coercive environments create a presumption of involuntariness.<sup>64</sup> After analyzing the detention conditions of non-Serb prisoners, the Appeals Chamber held that

a reasonable trier of fact should have arrived at the conclusion that the detainees' general situation negated any possibility of free consent. The Appeals Chamber is satisfied that the detainees worked to avoid being beaten or in the hope of obtaining additional food. Those who refused to work did so out of fear on account of the disappearances of detainees who had gone outside of the KP Dom. The climate of fear made the expression of free consent impossible and it may neither be expected of a detainee that he voice an objection nor held that a person in a position of authority need threaten him with punishment if he refuses to work in order for forced labour to be established.<sup>65</sup>

The ICTY firmly established that coercive environments deprive victims' of the ability to freely give consent.<sup>66</sup> The ICC captured the ICTY's interpretation of coercion when it outlined the elements of rape as a crime against humanity.<sup>67</sup> The ICC included force, threat of force or coercion as an element of rape, and also observed that rape could be committed "by taking advantage of a coercive environment."<sup>68</sup>

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<sup>63</sup> *See id.* ¶ 740.

<sup>64</sup> *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003), <http://www.icty.org/x/cases/kjnojelac/acjug/en/krn-aj030917e.pdf>.

<sup>65</sup> *Id.* ¶ 191.

<sup>66</sup> *See Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 452 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

<sup>67</sup> ICC Elements of Crimes, art. 7 (1) (g)-1, Sept. 9, 2002, [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element_of_Crimes_English.pdf).

<sup>68</sup> *Id.*

Still, not everyone married during DK were forced into their marital relationships. Because some individuals participated in arranging their own marriages<sup>69</sup> the defense can submit evidence of consent as an affirmative defense.<sup>70</sup> Some couples were able to maneuver around the KR's social constructs and were fortunate enough to arrange a marriage that was pleasing to both parties. "Some asked permission to marry someone of their own or a relative's choosing . . . . Most significantly, in the first and last year of the regime, more family requests were granted than in the middle years of Democratic Kampuchea."<sup>71</sup>

### **B. Element 2: A Conjugal Association**

In the Cambodian context, a conjugal association was an exclusive marital relationship<sup>72</sup> between two people resulting from a legally sanctioned ceremony performed by a state official.<sup>73</sup> Because forced marriage was *de jure* and not *de facto*,<sup>74</sup>

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<sup>69</sup> However, it is important to note that the defense would need to submit evidence that both parties consented. The consent of one party does not vitiate the fact that the other party was still forced into marriage. KR soldiers who were disabled were sometimes given the right to choose a wife. See KASUMI, *supra* note 3, at 19-20.

<sup>70</sup> Note that the defendant can argue that the circumstances were not coercive or the prosecution may not be able to establish force. In this situation, "the issue of consent will be at the forefront." Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 674-75 (2001); see also ICC Rules of Procedure and Evidence, Rule 70 & 72 (2002) (outlining principles of evidence in cases of sexual violence and the admissibility of evidence proving a victim's consent), [http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules\\_of\\_procedure\\_and\\_Evidence\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf).

<sup>71</sup> LEVINE, *supra* note 6, at 4.

<sup>72</sup> See Jain, *supra* note 8, at 9 ("a relationship of exclusivity between the 'couple', with potential disciplinary repercussions for breach of the arrangement").

<sup>73</sup> Note that the forced marriages that took place during the DK consisted of ceremonies that were sanctioned by the state. Therefore, any arguments that the mere conferral of the word "wife" or "husband" from one human being to another would result in criminal liability do not hold in the Cambodian context. See Gong-Gershowitz, *Forced Marriage: A New Crime Against Humanity*, 8 NORTHWESTERN UNIVERSITY JOURNAL OF INTERNATIONAL HUMAN RIGHTS 53, 54 (2009) (arguing that under the definition of

proof of the union establishes the conjugal association element. In some cases, real evidence such as registries may be available.<sup>75</sup> However, where real evidence is unavailable,<sup>76</sup> testimony of witnesses and other relevant evidence can be relied upon. Because the marriages were often group weddings and were public formal ceremonies, relevant evidence should be readily available.<sup>77</sup>

### **C. Element 3: Severe Suffering, or Mental or Psychological Injury to the Victim**

Women and men who were forced to marry experienced an extreme range of emotions from anger to sadness.<sup>78</sup> Many described the experience “as bitter as any other they suffered during the brutal regime.”<sup>79</sup> Some individuals were so emotionally overwhelmed by their forced marriage that they committed suicide after the ceremony.<sup>80</sup>

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forced marriage provided by the SCSL Appeals Chamber “words alone are sufficient to confer” marital status).

<sup>74</sup> In Sierra Leone, “[t]he marriage status was a de facto one. At no point was any marriage ceremony performed, and the ‘wives’ remained with their husbands after the conflict, primarily due to stigmatization, fear and lack of re-integration options within their communities . . . . On the other hand, forced marriages in Cambodia were carried out as a matter of state policy . . . . The status of marriage was more a formal rather than a de facto status.” Jain, *supra* note 8, at 1026.

<sup>75</sup> Videotape: Death and Rebirth (Germany) (1980).

<sup>76</sup> Toy-Cronin, *supra* note 1, at 548 (“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.”).

<sup>77</sup> Levine noted that the couples she interviewed who were married together in group weddings spoke openly about the couples that were married together “and seemed to keep up with others’ relationship statuses.” LEVINE, *supra* note 6, at 107.

<sup>78</sup> See Toy-Cronin, *supra* note 1, at 548-49. Levine highlights the connection between ritual and mental well being in Cambodian society in her study of weddings and births under the Khmer Rouge. Traditional marriage rituals carried great significance. Forced marriages eliminated these rituals and led individuals “to worry about themselves, their family, and ancestors.” See LEVINE, *supra* note 6, at 43-44. *Accord supra* Part I-II.

<sup>79</sup> Toy-Cronin, *supra* note 1, at 554.

<sup>80</sup> “After the ceremony some people committed suicide because they were upset and disappointed but I struggled and I thought I would fight against it.” Toy-Cronin, *supra* note 1, at 551. “Sometimes girls move in with a man and claim to be married in order to

The force and coercive measures that KR leaders employed to compel people to marry also caused victims' severe suffering.<sup>81</sup>

[One] 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.'<sup>82</sup>

Because of these coercive measures, some who merely contemplated not consenting to their forced marriage were plagued with visions of torture or death.<sup>83</sup> Others who resigned themselves to the ceremony still faced alarming intimidation.<sup>84</sup> One woman tried to refuse the order to hold hands with her future husband during the wedding ceremony until KR soldiers pointed a gun at her.<sup>85</sup> Issuing death threats, forcing people to witness violence, and the other coercive measures employed by KR leaders undoubtedly caused victims severe suffering and mental trauma.<sup>86</sup>

Forced marriage violated individuals' rights to autonomy and stripped them of the right to make what many would consider a life-changing decision, thus inflicting

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avoid being paired with a soldier they don't like. Some have committed suicide." LEVINE, *supra* note 6, at 7 (quoting FRANCOIS PONCHAUD, *CAMBODIA, YEAR ZERO* 125-26 (1978)).

<sup>81</sup> See Toy-Cronin, *supra* note 1, at 551.

<sup>82</sup> *Id.*

<sup>83</sup> "As one woman explained, 'I knew if I refused the marriage I would be beheaded because I saw this many times.'" *Id.* at 550.

<sup>84</sup> See *id.* at 550-51.

<sup>85</sup> *Id.* at 550-51.

<sup>86</sup> One "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.'" *Id.* at 551.

psychological injury on the victims.<sup>87</sup> Because victims experienced a wide range of situations and endured different harms, the evidence establishing severe suffering, or mental or psychological injury to the victim will necessarily vary on a case by case basis.

#### **D. Conclusion**

These harms and elements illustrate that the crime of forced marriage in the Cambodian context is largely a non-sexual crime.<sup>88</sup> It is not subsumed by any of the previously recognized gender-based crimes and therefore should be recognized as a separate crime. Examining the jurisprudence and history of previously recognized gender-based crimes reveals the gap in international criminal law between these crimes and forced marriage.

### **IV. Gender-Based Crimes Currently Punishable by International Tribunals**

#### **A. Rape as a crime against humanity<sup>89</sup>**

ECCC law criminalizes rape as a crime against humanity.<sup>90</sup> Rape is the only gender-based crime punishable as a separate offense in ECCC law.<sup>91</sup>

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<sup>87</sup> See Jain, *supra* note 8, at 1031.

<sup>88</sup> The Appeals Chamber in the AFRC case recognized that forced marriage is “not predominantly a sexual crime.” AFRC Case, Case No. SCSL-2004-16-A, Judgment, ¶ 195 (Feb. 22, 2008), <http://www.scsl.org/LinkClick.aspx?fileticket=6xjuPVYy%2fvM%3d&tabid=173>.

<sup>89</sup> Any enumerated crime against humanity must satisfy additional co-textual elements. The enumerated crime must also “be committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds.” See Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 5.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

The International Criminal Tribunal for Rwanda (“ICTR”) criminalizes rape as a crime against humanity under Article 3(g).<sup>92</sup> In *Prosecutor v. Akayesu*, Trial Chamber I defined the actus reus of rape “as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”<sup>93</sup> with the mens rea as the “intent[] to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.”<sup>94</sup> Using aiding and abetting as a mode of liability, the chamber found Akayesu guilty of rape as a crime against humanity.<sup>95</sup> The ICTR broadly characterized rape as a type of sexual invasion of a victim’s body with any type of object. The ICTR also emphasized the coercive environment that often surrounds rapes committed as crimes against humanity.<sup>96</sup>

Scholars have recognized the International Criminal Tribunal of Yugoslavia (“ICTY”) as the first tribunal to develop the international jurisprudence surrounding gender-based crimes.<sup>97</sup> Article 5(g) of the ICTY statute criminalizes rape as a crime against humanity.<sup>98</sup> In *Prosecutor v. Furundžija*, the ICTY trial chamber noted that

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<sup>92</sup> Statute of the International Criminal Tribunal for Rwanda, art. 3(g) (1994) [hereinafter ICTR Statute],

<http://liveunictr.altmansolutions.com/Portals/0/English/Legal/Tribunal/English/2007.pdf>.

<sup>93</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 598 (Sept. 2, 1998),

<http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

<sup>94</sup> *Prosecutor v. Renzaho*, ICTR-97-31-DP, Judgment, ¶ 792 (July 14, 2009),

<http://liveunictr.altmansolutions.com/Portals/0/Case/English/Renzaho/judgement%20and%20sentence/090714.pdf>.

<sup>95</sup> *Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

<sup>96</sup> *Infra* text accompanying notes 98-110.

<sup>97</sup> Boon, *supra* note 70, at 674-75; *see also* INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY 179 (Gideon Boas & William A. Schabas eds., 2003) (“It marked the first convictions in history for enslavement as a crime against humanity, based on acts of sexual violence.”).

<sup>98</sup> Statute for the International Criminal Tribunal for the Former Yugoslavia art. 5(g) [hereinafter ICTY Statute],

[http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf).

international human rights and humanitarian law did not contain a definition for rape.<sup>99</sup>

After scrutinizing the “principles of criminal law common to the major legal systems of the world”<sup>100</sup> the chamber outlined the actus reus elements of rape as follows:

- (i) the sexual penetration,<sup>101</sup> however slight:
  - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>102</sup>

In *Prosecutor v. Kunarac*, the Appeals Chamber expounded upon the tribunal’s interpretation<sup>103</sup> of the second element of rape that *Furundžija* outlined—“by coercion or force or threat of force against the victim or a third person.”<sup>104</sup> Concluding that rape as a crime against humanity takes place under very different circumstances than rape in the

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<sup>99</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

<sup>100</sup> *Id.* ¶ 177.

<sup>101</sup> Emphasizing the role of international humanitarian and human rights law in protecting human dignity and “shield[ing] human beings from outrages upon their personal dignity,” the Chamber noted that actual penetration does not need to incur in order for criminal liability for sexual assault to incur. “It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity.” *Id.* ¶¶ 184-86.

<sup>102</sup> *Id.* ¶ 185.

<sup>103</sup> “The Trial Chamber considers that the *Furundžija* definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by international law.” *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 148 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>. But note that the Appeals Chamber was analyzing consent in the context of rapes that took place while the women were enslaved. *Id.*

<sup>104</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 185 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

domestic context,<sup>105</sup> the chamber concluded that consent is not an element of rape that needs to be proven.<sup>106</sup>

This interpretation has since been widely accepted by other tribunals.<sup>107</sup> A coercive environment creates a presumption of non-consensual sexual penetration.<sup>108</sup> Therefore, in *Kunarac*, the Appeals Chamber emphasized that “consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, *assessed in the context of the surrounding circumstances*. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”<sup>109</sup> (first emphasis added).

Article 2(g) of the Special Court for Sierra Leone penalizes rape as a crime against humanity.<sup>110</sup> Finding Sesay, Kallon and Gbao criminally responsible for the rapes of women and girls in many different districts<sup>111</sup> the court defined the elements of rape as follows:

- (i) The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the

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<sup>105</sup> “In most common law systems, it is the absence of the victim’s free and genuine consent to sexual penetration which is the defining characteristic of rape.” Prosecutor v. *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 453 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

<sup>106</sup> *Id.*

<sup>107</sup> *Supra* text accompanying notes 98-108; *infra* text accompanying notes 109-20.

<sup>108</sup> ICC Elements of Crimes, art. 7 (1) (g)-1, Sept. 9, 2002, [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element_of_Crimes_English.pdf) (noting that the perpetrator must have invaded the victim’s body “by force, or by threat of force or coercion, . . . or by taking advantage of a coercive environment). *See also Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T at ¶ 461.

<sup>109</sup> *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T at ¶ 461.

<sup>110</sup> Statute of the Special Court for Sierra Leone, art. 2(g), Aug. 14, 2000 [hereinafter SCSL Statute].

<sup>111</sup> RUF Case, Case No. SCSL-04-15-T, Judgment, ¶ 143 (Mar. 2, 2009), <http://www.scs-l.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3d&tabid=215>.

- Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
- (ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;
  - (iii) The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and
  - (iv) The Accused knew or had reason to know that the victim did not consent.<sup>112</sup>

Like the ICTY and ICTR, the SCSL's definition of rape is broad enough to cover any type of penetration with any object and also highlights that victims are incapable of voluntary consent in coercive environments.<sup>113</sup>

The International Criminal Court ("ICC") criminalizes rape as a crime against humanity under Article 7(1)(g)-1 of the Rome Statute.<sup>114</sup> The article encompasses the elements of rape that were outlined in the previous decisions of other international criminal and hybrid tribunals. Article 7(1)(g)-1 outlines the elements of rape as follows:

1. The perpetrator invaded<sup>115</sup> the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment,

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<sup>112</sup> *Id.*

<sup>113</sup> For example, during times of war or when the victim is too young to be mentally capable of consenting. *Id.* ¶¶ 146-50.

<sup>114</sup> Rome Statute of the International Criminal Court, art. 7(1)(g)-1, *adopted* July 17, 1998 [hereinafter Rome Statute].

<sup>115</sup> "The concept of 'invasion' is intended to be broad enough to be gender-neutral." ICC Elements of Crimes, art. 7 (1) (g)-1 n.15, Sept. 9, 2002, [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element_of_Crimes_English.pdf).

or the invasion was committed against a person incapable of giving genuine consent.<sup>116</sup>

No jurisprudence has come out of the ICC regarding rape.

Rape is distinguishable from forced marriage as it took place during the DK. The SCSL noted in *Sesay* that forced marriage had “a distinct element from the crime of rape . . . , and *vice versa*. The offence of rape requires sexual penetration . . . .”<sup>117</sup> Rape requires a perpetrator to invade the body of a victim.

Even though the KR expected couples to consummate their relationship after marriage,<sup>118</sup> not every couple followed their orders.<sup>119</sup> One man, who considered himself lucky when his unit chief noticed that he was in love with a woman and arranged their marriage, described how he entered into an agreement with his wife not to have sex.<sup>120</sup> “I fell in love with a widow who was two or three years older than me . . . . Unfortunately, after the marriage, I learned that she did not love me. She asked me not to have sex with her and I agreed.”<sup>121</sup> In these cases, the element of sexual penetration is missing. However, even where sexual penetration occurred following the marriage, rape still fails to capture the link between the perpetrator and victim of rape because it was not the KR

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<sup>116</sup> “It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.” *Id.*

<sup>117</sup> RUF Case, Case No. SCSL-04-15-T, Judgment, ¶ 2306 (Mar. 2, 2009), <http://www.scs-sl.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3d&tabid=215>.

<sup>118</sup> “Almost all the informants reported that they believed that the *Angkar* required them to have sex with their new spouse.” Toy-Cronin, *supra* note 1, at 553. *But see infra* text accompanying notes 120-22.

<sup>119</sup> Moreover, not every commune chief ordered sexual relations following the marriage ceremony. *See generally* LEVINE, *supra* note 6 (reporting statistics of whether couples were advised to have sex or not based on provinces).

<sup>120</sup> KASUMI, *supra* note 3, at 45.

<sup>121</sup> *Id.*

who directly invaded the body of the wife, but the husband who often also had been forced into the marriage.

Forced marriage in the Cambodian context is unique when compared to incidences of forced marriage in other countries such as Rwanda, Sierra Leone and Uganda. By contrast, in Cambodia, husbands were often not the perpetrators of forced marriage. These husbands, who were also victims, felt great pressure to consummate their marriages because the KR often spied on new couples to determine whether they had engaged in sexual relations. The spying could engender a great deal of fear in both the husband and wife. Even the aforementioned victim who entered into an agreement with his wife not to have sex “worried about the militias who came to check [his] house every night.”<sup>122</sup> In these instances, it is not the perpetrator using force, threat of force or coercion to invade the body of a victim. Instead, both husband and wife are victims of force, threat of force or coercion.

Therefore, the elements of rape fail to capture the crime of forced marriage as it took place during the DK because sexual penetration did not necessarily occur, the perpetrator-victim dynamic<sup>123</sup> is missing even in cases where sexual penetration did occur and rape does not address the “non-sexual elements [of forced marriage] that are

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<sup>122</sup> *Id.* This man’s wife was later “arrested by a Khmer Rouge soldier and was accused of not obeying the Angkar’s order.” He never saw his wife again. *Id.*

<sup>123</sup> However, sexual violence as defined by the ICC captures the victim-victim relationship. “The perpetrator . . . caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion . . . .” ICC Elements of Crimes, art. 7(1)(g)-6, Sept. 9, 2002, [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B\\_68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B_68E5F9082543/0/Element_of_Crimes_English.pdf).

comparable violations of human dignity.”<sup>124</sup> Since rape does not capture the crime of forced marriage and no other sexual crimes fall within the jurisdiction of the ECCC, forced marriage must be charged as an other inhumane act (“OIA”).

## **B. Other Inhumane Acts**

ECCC law does not list forced marriage as a separate crime against humanity, however it was charged in Case 002 by the Co-Investigating Judges in their September 15, 2010 closing order<sup>125</sup> and meets the definition of an OIA.<sup>126</sup> The Nuremberg Charter established the residual category of OIAs under Article 6(c).<sup>127</sup> Control Council Law No. 10, created to guide post-war crimes trials in the occupied zones in Germany, and the Tokyo Charter, created to prosecute Japanese for WWII crimes, both recognized the OIA category under Article II(1)(c) and Article 5(c) respectively.<sup>128</sup> Because “one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts”<sup>129</sup> the residual category exists to capture those crimes against humanity that are not enumerated.<sup>130</sup>

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<sup>124</sup> Jain, *supra* note 8, at 1021. “To pigeon hole them into the category of sexual offences betrays a failure to understand the offences in all their complexity, and underestimates the severity and kinds of suffering they can result in for their victims.” *Id.* at 1021.

<sup>125</sup> ECCC Press Release, *available at*

[http://www.eccc.gov.kh/english/cabinet/press/169/ECCC\\_OCIJ\\_PR\\_16\\_Sep\\_2010%28En%29.pdf](http://www.eccc.gov.kh/english/cabinet/press/169/ECCC_OCIJ_PR_16_Sep_2010%28En%29.pdf).

<sup>126</sup> “To qualify as an ‘other inhumane act’ under crimes against humanity, apart from meeting the general elements common to all crimes against humanity, the conduct must not already be covered under one of the crimes particularized as crimes against humanity.” *Id.* at 1028.

<sup>127</sup> ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 113 (2d ed. 2008).

<sup>128</sup> KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 126 (2001).

<sup>129</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Commentary), art. 23, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention Commentary], <http://www.icrc.org/ihl.nsf/COM/380-600006?OpenDocument>.

<sup>130</sup> See Prosecutor v. Kayishema, Case No. ICTR-95-1, Judgment, ¶ 149 (May 21, 1999). “[T]he more specific and complete a list tries to be, the more restrictive it becomes.” Geneva Convention Commentary, art. 23.

To satisfy the requisite elements of OIAs, the perpetrator must “commit an act of similar gravity and seriousness to the other crimes against humanity enumerated in the relevant instrument, with intent to cause that other inhumane act.”<sup>131</sup> When defining inhumane treatment or acts, the Geneva Convention<sup>132</sup> and scholars have lauded flexibility as opposed to rigid lists, but the category of OIAs has also run afoul of the principle of specificity because of its adaptive nature.<sup>133</sup> International tribunals have helped to “rein in the imprecise and open-ended nature of this provision.”<sup>134</sup>

Relying upon the ICC Statute and ILC Commentary,<sup>135</sup> the trial chamber in *Prosecutor v. Kayeshima* articulated a standard for determining how an act qualifies as an OIA.<sup>136</sup> The chamber observed that OIAs were “of similar gravity and seriousness to the enumerated acts” of the ICTR statute and that they were “acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.” Although the chamber articulated a definition, it found the

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<sup>131</sup> KITTICHAISAREE, *supra* note 127, at 128; *Accord Prosecutor v. Kayishema*, Case No. ICTR-95-1, Judgment, ¶ 154 (May 21, 1999) (“[F]or an accused to be found guilty of crimes against humanity for other inhumane acts, he must commit an act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the other inhumane act.”).

<sup>132</sup> Geneva Convention Commentary, art. 3 (“It is always dangerous to try to go into too much detail – especially in this domain.”).

<sup>133</sup> CASSESE, *supra* note 126, at 113 (noting that the “provision lack[ed] any precision and [was] therefore at odds with the principle of specificity proper to criminal law”).

<sup>134</sup> KITTICHAISAREE, *supra* note 127, at 127.

<sup>135</sup> The chamber noted that the ICC statute’s definition provided greater detail than the ICTR statute. It also reviewed the ILC Commentary on Article 19 of its Draft Code of Crimes. “The Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which may constitute crimes against humanity. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity.” *Prosecutor v. Kayishema*, Case No. ICTR-95-1, Judgment, ¶ 150 (May 21, 1999).

<sup>136</sup> *Infra* text accompanying notes 137-41.

defendant not guilty of OIAs because the Prosecution failed to “particularise the nature of the acts” relied upon for the charge.<sup>137</sup>

In *Akayesu*, the ICTR found Akayesu criminally liable for OIAs. The Prosecution specified the following acts for the charge:

- (i) the forced undressing of the wife of Tharcisse outside the bureau communal, after making her sit in the mud, as witnessed by Witness KK;
- (ii) the forced undressing and public marching of Chantal naked at the bureau communal;
- (iii) the forced undressing of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe, and the forcing of the women to perform exercises naked in public near the bureau communal.<sup>138</sup>

The trial chamber characterized all of these acts as sexual violence and concluded that sexual violence fell “within the scope of ‘other inhumane acts.’”<sup>139</sup> Although the chamber did not clearly articulate<sup>140</sup> how these acts met the definition outlined in *Kayeshima*, one can conclude that the aforementioned acts (1) were of similar gravity and seriousness to the other enumerated crimes in the ICTR statute, (2) were committed with the intent to cause the act and (3) caused injury to the victims’ physical or mental integrity, health or human dignity.<sup>141</sup>

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<sup>137</sup> *Kayishema*, Case No. ICTR-95-1 at ¶ 149 (May 21, 1999). Consequently, the defendant could not prepare an adequate defense to address the charges. *See id.* ¶¶ 586-87.

<sup>138</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 697 (Sept. 2, 1998), <http://liveunictr.altmansolutions.com/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

<sup>139</sup> *Id.* ¶ 688.

<sup>140</sup> The Chamber observed that the women were subjected to multiple acts of sexual violence—defined as rape and sexual abuse—often accompanied by death threats or threats of physical harm. The Chamber then concluded that because of these acts of sexual violence, the women “lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.” *Id.* ¶ 10A & 12A.

<sup>141</sup> Prosecutor v. Kayishema, Case No. ICTR-95-1, Judgment, ¶ 150 (May 21, 1999).

International tribunals have recognized enforced prostitution, sexual violence and sexual slavery as OIAs or separate crimes against humanity. One can analyze whether forced marriage qualifies as an OIA by applying the elements set forth in *Kayishema* and by analyzing the jurisprudence of the aforementioned gender-based crimes.

### **1. Enforced prostitution as a crime against humanity**

In the ECCC law establishing the Extraordinary Chambers, enforced prostitution is not listed as a crime against humanity.<sup>142</sup> The ICC lists enforced prostitution as a separate crime against humanity under its statute.<sup>143</sup> The ICC outlines the elements for enforced prostitution under Article 7(1)(g)-3 of the Rome statute:

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

Currently, none of the individuals indicted by the ICC have been charged with enforced prostitution.<sup>144</sup> Similarly, while Article 2(g) of the SCSL enumerates enforced prostitution as a separate crime against humanity,<sup>145</sup> the tribunal has not indicted any individual for enforced prostitution.<sup>146</sup>

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<sup>142</sup> ECCC Law art. 5.

<sup>143</sup> Rome Statute art. 7(1)(g)-3.

<sup>144</sup> International Criminal Court, *All Cases*, ICC, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Cases/> (last visited Aug. 2, 2010).

<sup>145</sup> SCSL Statute art. 2(g), <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3d&tabid=70>.

<sup>146</sup> *Cases*, SPECIAL COURT FOR SIERRA LEONE, <http://www.sc-sl.org/CASES/tabid/71/Default.aspx> (last visited Aug. 2, 2010).

Although neither the ICTY nor the ICTR<sup>147</sup> statutes<sup>148</sup> recognize enforced prostitution as a separate crime against humanity,<sup>149</sup> the ICTY has recognized enforced prostitution as an OIA.<sup>150</sup> However, it has never held any individuals liable for the act.<sup>151</sup> In *Prosecutor v. Kupreskic et al.*, the ICTY trial chamber discussed the residual category of OIAs and how to determine what acts the category covers.<sup>152</sup> The chamber concluded that OIAs “undoubtedly embrace[d] . . . enforced prostitution.”<sup>153</sup> Similarly, in *Prosecutor v. Kvocka*, the ICTY trial chamber found that enforced prostitution was “listed in the jurisprudence of the Tribunal.”<sup>154</sup> The chamber relied upon international human rights instruments and precedent within the court, emphasizing that the court’s

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<sup>147</sup> The ICTR chamber observed that the ICC recognizes enforced prostitution as a crime against humanity in Article 7. *Prosecutor v. Rutanga*, Case No. ICTR-96-3, Judgment, ¶ 65 (Dec. 6, 1999); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 576-77 (Sept. 2, 1998),

<http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

<sup>148</sup> ICTY Statute,

[http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf); ICTR Statute, <http://www.unict.org/Portals/0/English/Legal/Tribunal/English/2007.pdf>.

<sup>149</sup> Note that “while the crime of enforced prostitution was not specifically listed in the Statute of the International Criminal Tribunal for the Former Yugoslavia, it was considered by the Secretary-General of the United Nations.” Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT’L L. 605, 617 (2004).

<sup>150</sup> *Prosecutor v. Kvocka*, Case No. IT-98-30/1-T, Judgment, ¶ 180 n.343 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001),

<http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf>.

<sup>151</sup> *See id.*; *see also* United Nations: International Criminal Tribunal for the Former Yugoslavia, *The Cases*, ICTY-TPIY, <http://www.icty.org/action/cases/4> (last visited Aug. 2, 2010) (listing all judgments in searchable form).

<sup>152</sup> *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, ¶¶ 562-66 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000),

<http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

<sup>153</sup> *Id.* ¶ 566.

<sup>154</sup> *Prosecutor v. Kvocka*, Case No. IT-98-30/1-T, Judgment, ¶ 208 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001), <http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf>.

jurisprudence included OIAs that “intentionally inflicted serious bodily or mental harm upon the victim, with the degree of severity assessed on a case-by-case basis.”<sup>155</sup>

Although listed as a separate crime in the Rome Statute, many scholars still disagree on whether enforced prostitution is subsumed by sexual slavery and whether the term is outdated.<sup>156</sup> There was much debate on the difference between enforced prostitution and sexual slavery when the Rome statute’s preparatory committee decided to list both crimes as separate offenses.<sup>157</sup> In 1996, the Special Rapporteur on violence against women, its causes and consequences reported to the Commission on Human Rights that women who were “forced to render sexual services” during WWII in stations that operated much like brothels were victims of sexual slavery.<sup>158</sup> The Special

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<sup>155</sup> Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 206 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001), <http://www.icty.org/x/cases/kvočka/tjug/en/kvo-tj011002e.pdf>.

<sup>156</sup> Oosterveld, *supra* note 148, at 618.

<sup>157</sup> Oosterveld, *supra* note 148, at 612-15. “Academic and nongovernmental commentators disagreed at the time, and still disagree, on the answer to that question. Some feel that sexual slavery is a broader, more sensitive—and therefore more useful—term that encompasses or replaces enforced prostitution. Others argue that both sexual slavery and enforced prostitution are different terms with different elements, and that enforced prostitution should not be considered to be subsumed within sexual slavery. Askin states that ‘while ‘(en)forced prostitution’ is usually the term used when women are forced into sexual servitude during wartime, the term ‘sexual slavery’ more accurately identifies the prohibited conduct.’ Fan notes that enforced prostitution shares the most fundamental characteristics of slavery, and while the terms might be used interchangeably, a reference to commodified sexual slavery is more accurate. Argibay elaborates on this argument, stating that the term ‘enforced prostitution’ suggests a level of voluntarism that is not present, and stigmatizes the victims; because prostitution is a crime in many countries, the use of the term ‘prostitution’ confuses the victim and perpetrator and therefore does not communicate the same level of egregiousness as sexual slavery.” *Supra* at 619.

<sup>158</sup> Mission to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime: Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, Comm’n on H.R., 52nd Sess., Item 9(a), ¶ 54, U.N. Doc. E/CN.4/1996/53/Add.1 (1996).

Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict reported in 1998 that much sexual violence inflicted upon women during armed conflict is a form of sexual slavery.<sup>159</sup> Because the delegates drafting the Rome statute were unclear as to whether sexual slavery subsumed enforced prostitution they chose to include both crimes for fear that “enforced prostitution might be too narrow to capture all of the violations that the crime of sexual slavery can capture and thus that it is appropriate to distinguish between the two crimes.”<sup>160</sup>

Although there was much debate over whether to list enforced prostitution as a separate crime against humanity, most delegates would agree that enforced prostitution is a *narrow* crime<sup>161</sup> meant to prosecute those whose goal is to obtain a monetary gain or other advantage from forced sexual acts (emphasis added).<sup>162</sup> Therefore, enforced prostitution is too narrow a crime to capture the elements of forced marriage because it emphasizes sexual acts and also because the link between any advantage received in

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<sup>159</sup> Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, U.N. Comm'n on H.R., 50th Sess., Agenda Item 6, ¶ 25, U.N. Doc.E/CN.4/Sub.2/1998/13 (1998).

<sup>160</sup> Oosterveld, *supra* note 148, at 622.

<sup>161</sup> “Sexual slavery also encompasses most, if not all forms of forced prostitution.” Systematic rape, sexual slavery and slavery-like practices during armed conflict, Report by the Systematic rape, sexual slavery and slavery-like practices during armed conflict, McDougall, *supra* note 160, ¶ 31. “[A] category of forced prostitution may exist involving less than slave-like conditions. Women may be forced to submit to serial rape in exchange for their safety or that of others or the means of survival. Even though the women would not, strictly speaking, be prostitutes, they would be forced to engage in an exchange of sex for something of value for one or more men in a dominant position of power. But even in cases where women are free to go home at night or even to escape, the conditions of warfare might nonetheless be so overwhelming and controlling as to render them little more than sex slaves.” Oosterveld, *supra* note 148, at 621.

<sup>162</sup> Oosterveld, *supra* note 148, at 616-22.

exchange or in connection with those acts is either deficient or too tenuous to capture the essence of enforced prostitution.

The first element of enforced prostitution states that “the perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion . . . .” Yet as previously discussed not every couple forced into marriage engaged in sexual acts. Moreover, in some regions of the DK, couples reported that commune leaders did not explicitly command or coerce them into engaging in sexual acts following the wedding.<sup>163</sup> In these cases, the first element of enforced prostitution is missing as well as the second element: the perpetrator gaining some pecuniary or other advantage “for or in connection with the acts of a sexual nature.”<sup>164</sup>

One may argue that the KR expected to gain an advantage from forcing couples to marry and engage in sexual acts: increasing the ranks of the revolution through childbirth. However, this argument interprets advantage too broadly. It also distorts the crime of enforced prostitution by equating the social advantages that a state seeks through its social policies with the advantage that perpetrators or other persons expect to obtain from forced sexual acts. With forced marriage, the KR engaged in social engineering<sup>165</sup> by prevent[ing] people from establishing relationships with each other and from being distracted from their work and their loyalty to the revolution.”<sup>166</sup> The KR’s goal was

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<sup>163</sup> *Supra* notes 119-22 and accompanying text.

<sup>164</sup> ICC Elements of Crimes, art. 7 (1) (g)-3, Sept. 9, 2002, [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element_of_Crimes_English.pdf).

<sup>165</sup> *See generally*, MAM, *supra* note 2 (examining DK policies and Angkar’s goal to control the populace by restructuring women’s role in society).

<sup>166</sup> MAM, *supra* note 2, at 33 (highlighting that the KR used forced marriage for a number of reasons—to control sexuality, to determine loyalty to the regime, to optimally use the labor force until it was exhausted).

control of its citizens and not to benefit from acts of a sexual nature.<sup>167</sup> The link between any sexual act—in cases where a sexual act occurred—is too tenuous to satisfy the elements of enforced prostitution.

## 2. Sexual violence as a crime against humanity

The ECCC does not recognize sexual violence as a crime against humanity. Neither the ICTY<sup>168</sup> nor the ICTR<sup>169</sup> statutes list sexual violence as a crime against humanity. However, while outlining the elements of rape, the ICTR noted that sexual violence includes rape and defined sexual violence as an “act of a sexual nature which is committed on a person under circumstances which are coercive.”<sup>170</sup> Additionally, the ICTR trial chamber recognized sexual violence as an OIA when it found Akayesu guilty of OIAs for acts the trial chamber characterized as sexual violence.<sup>171</sup>

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<sup>167</sup> *Supra* notes 119-22 and accompanying text.

<sup>168</sup> *See* Prosecutor v. Nikolic, Case No. IT-94-2-S, Sentencing Judgment, ¶¶ 108-11 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003) (concluding that sexual violence was a form of persecution and therefore qualified as a crime against humanity under Article 5 of the ICTY statute), [http://www.icty.org/x/cases/dragan\\_nikolic/tjug/en/nik-sj031218e.pdf](http://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf).

<sup>169</sup> *See* Prosecutor v. Ndindiliyiman, Case No. ICTR-00-56-T, Decision on Nzuwonemeye’s Motion to Exclude Acts Not Pleaded in the Indictment, ¶ 11 (July 4, 2008) (concluding that sexual violence “can be considered a form of torture”), <http://www.unicttr.org/Portals/0/Case/English/Ndindiliyimana/decisions/080704.pdf>. The ICTR has used evidence of sexual violence to establish genocide. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 507-08 (Sept. 2, 1998) (noting that preventing births is one way to commit genocide therefore rapes, committed in societies where lineage is passed through the father, can constitute evidence of genocide); *see also* Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Judgment, ¶¶ 574-76 (Feb. 27, 2009) (finding Rukundo guilty of genocide “through his sexual assault of a young Tutsi woman”) (case currently on appeal). However, the ICTR has not charged any individuals with sexual violence as a crime against humanity. International Criminal Tribunal for Rwanda, *Status of Cases*, UNICTR, <http://www.unicttr.org/Cases/tabid/204/Default.aspx> (last visited Aug. 2, 2010).

<sup>170</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 597-98 (Sept. 2, 1998).

<sup>171</sup> *See supra* notes 135-41 and accompanying text.

The ICC recognizes sexual violence as a separate crime against humanity under Article 7(1)(g)-6. The ICC outlines the elements as follows

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

None of the cases currently pending before the ICC have indicted anyone for sexual violence as a crime against humanity.

The SCSL penalizes “any other form of sexual violence.” The elements are defined as follows:

- (1) The perpetrator committed an act of a sexual nature against one or more persons or caused such persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person or person's incapacity to give genuine consent.
- (2) Such conduct was of a gravity comparable to the acts referred to in Art 2.g of the Statute.
- (3) The perpetrator was aware of the factual circumstances that established the gravity of the conduct.<sup>172</sup>

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<sup>172</sup> Prosecutor v. Brima, Case No. , Decision on Defense Motion for Rule 98, ¶ 110 (Mar. 31, 2006) (citing the Kvočka trial chamber's findings), <http://www.sc-sl.org/LinkClick.aspx?fileticket=CR6ODLk2IfA=&tabid=157>. Note that the court references Kvočka because its statute does not define “any other form of sexual violence.” The trial chamber in Kvočka concluded that: “sexual violence is broader than rape and includes such crimes as sexual slavery or molestation” and “would also include such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization’ and other similar forms of violence.” Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 180, ¶ 180 n.343 (Int'l Crim. Trib. for the Former

Sexual violence, unlike rape, captures the two-victim dynamic because the perpetrator can cause “one or more persons to engage in an act of a sexual nature.”<sup>173</sup> However, sexual violence is a broad category intended to capture forced acts of a sexual nature that may not be outlined in a statute. Consequently, like the other previously discussed gender-based crimes, sexual violence fails to capture the conjugal association of forced marriage because of its emphasis on sexual acts.<sup>174</sup>

Sexual violence also fails to capture the harms that resulted from forced marriage. Because forced marriages in the Cambodian context were state sponsored and legally sanctioned, harms unrelated to any sexual acts that may have occurred in the marital relationship resulted from the forced conjugal association. Couples were seen as married by the community and often felt obligated to remain in their relationships even after the fall of the KR. Sexual violence fails to capture these harms.

### **3. Sexual slavery as a crime against humanity**

Neither the ICTY nor the ICTR criminalizes sexual slavery in their statutes.<sup>175</sup> However, in *Kunarac*, where the accused forcibly<sup>176</sup> detained several girls in different

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Yugoslavia Nov. 2, 2001), <http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf>.

<sup>173</sup> *Supra* note 173 and accompanying text. Enforced prostitution also captures this dynamic. *Supra* Part IV.B.1.

<sup>174</sup> Jain argued that using other gender-based crimes to charge forced marriage failed to capture “non-sexual elements [of forced marriage] that are comparable violations of human dignity.” Jain, *supra* note 8, at 1021.

<sup>175</sup> ICTY Statute, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf); ICTR Statute, <http://liveunictr.altmansolutions.com/Portals/0/English/Legal/Tribunal/English/2007.pdf>.

<sup>176</sup> The inability of the women to leave was analyzed much like the coercive environment is analyzed in rape. Although there were times that they were alone in the apartment or may even have had the physical ability to leave the court found that the women were

apartments<sup>177</sup> and continually raped them,<sup>178</sup> the ICTY charged the accused with enslavement and rape as a crime against humanity thus capturing the offense of sexual slavery.<sup>179</sup> Both of these crimes have also been charged by the ECCC in Case 002.<sup>180</sup>

In *Furundzija*, the ICTY trial chamber had already defined the elements of rape, but the tribunal had not yet defined the elements of enslavement and the ICTY statute failed to provide guidance. Consequently, the trial chamber examined many sources<sup>181</sup> before finding that the prohibition on enslavement is customary international law.<sup>182</sup> The chamber then defined “the *actus reus* of [enslavement] . . . [a]s the exercise of any or all of the powers attaching to the right of ownership over a person [and] the *mens rea* [as] . . . the intentional exercise of such powers.”<sup>183</sup>

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psychologically incapable of leaving because of the environment. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

<sup>177</sup> The two accused kept a number of girls for varying periods of time and sometimes moved them to different locations. *Id.*

<sup>178</sup> Not only did the Accused rape the women but they also allowed other soldiers to do so. “FWS-87 testified that she stayed at Karaman’s house for a period close to two months, and during that time was continuously raped by Serb soldiers, as were the other girls in the house.” *Id.* ¶ 63. The Accused also forced the victims to cook, clean and to perform other duties. *Id.* at ¶ 340.

<sup>179</sup> *Id.* ¶ 515.

<sup>180</sup> ECCC Press Release, available at

[http://www.eccc.gov.kh/english/cabinet/press/169/ECCC\\_OCIJ\\_PR\\_16\\_Sep\\_2010%28En%29.pdf](http://www.eccc.gov.kh/english/cabinet/press/169/ECCC_OCIJ_PR_16_Sep_2010%28En%29.pdf).

<sup>181</sup> The trial chamber cited the following instruments: Slavery Convention, the 1956 Supplementary Slavery Convention, the 1930 Forced and Compulsory Labour Convention, 1957 Convention Concerning the Abolition of Forced Labour, the Nuremberg Charter, Allied Control Council Law No 10 of 1945, the Tokyo Charter, various international human rights treaties, sections of the Geneva Convention (including the protocols). *Id.* ¶ 515-38.

<sup>182</sup> Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 539 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

<sup>183</sup> *Id.* ¶ 540.

The Rome Statute Article 7(1)(g)-2 also lists sexual slavery as a crime against humanity. The elements are:

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.<sup>184</sup>
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

Although the ICC has indicted people for the crime of sexual slavery no judgment or jurisprudence has yet come out of the indictments.<sup>185</sup>

The SCSL statute explicitly penalizes sexual slavery under Article 2(g).<sup>186</sup> In *RUF*, the Trial Chamber found Sesay, Kallon, and Gbao guilty of sexual slavery as a crime against humanity after finding that they held women against their will for varying periods of time and forced them to engage in sexual intercourse.<sup>187</sup> Relying upon the Rome Statute of Elements, the trial chamber defined sexual slavery as:

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.

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<sup>184</sup> ICC noted that “It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.” ICC Elements of Crimes, art. 7 (1) (g)-2 n.18, Sept. 9, 2002, [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element_of_Crimes_English.pdf).

<sup>185</sup> However, the warrants of arrest for Harun (May 1, 2007), Kushayb (May 1, 2007) and Katanga and Chui (Sept. 30, 2008) include a charge of sexual slavery. International Criminal Court, *All Cases*, ICC, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Cases/> (last visited Aug. 2, 2010).

<sup>186</sup> SCSL Statute art. 2(g), <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=70>.

<sup>187</sup> *RUF Case*, Case No. SCSL-04-15-T, Judgment (Mar. 2, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3d&tabid=215>.

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.<sup>188</sup>

Citing the ICTY's judgment in *Kunarac* and its definition of enslavement, the trial chamber concluded that the following "indicia" were illustrative when examining whether sexual slavery took place: "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."<sup>189</sup>

The SCSL is the only tribunal that has charged forced marriage and grappled with the question of whether a gender-based crime subsumes forced marriage. In *AFRC*, the trial chamber analyzed whether sexual slavery subsumed the crime of forced marriage.<sup>190</sup> The trial chamber declined to recognize forced marriage as a crime against humanity of other inhumane acts and held that sexual slavery subsumed forced marriage.<sup>191</sup>

In *AFRC*, the Prosecution argued that although forced marriage had sexual elements, it differed from sexual slavery because the perpetrator forced the woman to behave as a wife by performing non-sexual duties such as cooking, cleaning, laundry and rearing children.<sup>192</sup> The Trial Chamber was not persuaded by the Prosecution's

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<sup>188</sup> *AFRC* Case, Case No. SCSL-2004-16-A, Judgment, ¶ 708 (Feb. 22, 2008), <http://www.scsl.org/LinkClick.aspx?fileticket=6xjuPVYy%2fvM%3d&tabid=173>.

<sup>189</sup> *RUF* Case, Case No. SCSL-04-15-T at ¶ 160.

<sup>190</sup> *AFRC* Case, Case No. SCSL-2004-16-A, Judgment (Feb. 22, 2008), <http://www.scsl.org/LinkClick.aspx?fileticket=6xjuPVYy%2fvM%3d&tabid=173>.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

argument and concluded that “the Prosecution did not adduce any evidence that forced marriage was a non-sexual crime.”<sup>193</sup>

The Appeals Chamber reversed the trial chamber’s decision.<sup>194</sup> Persuaded by the Prosecution’s argument, the Chamber held that forced marriage was not primarily a sexual crime and therefore could not be subsumed by sexual slavery.<sup>195</sup> Referencing Justice Sebutinde’s dissenting opinion from the Trial Chamber, the Appeals Chamber highlighted the stigma that “Bush wives” face when trying to reintegrate into their communities.<sup>196</sup> It also emphasized the non-sexual conjugal duties that rebel husbands forced their wives to perform.<sup>197</sup> After detailing these distinctions, the Appeals Chamber described forced marriage as “a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.”<sup>198</sup>

The decision of the Appeals Chamber has been criticized<sup>199</sup> for labeling the experiences of the women in Sierra Leone as forced marriage. One scholar stated that forced marriage was “a criminal misnomer that masked what, under international

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<sup>193</sup> *Id.* ¶ 176.

<sup>194</sup> AFRC Case, Case No. SCSL-2004-16-A, Judgment (Feb. 22, 2008), <http://www.scsl.org/LinkClick.aspx?fileticket=6xjuPVYy%2fvM%3d&tabid=173>.

<sup>195</sup> *Id.* ¶¶ 187-202.

<sup>196</sup> *Id.* ¶¶ 190-96.

<sup>197</sup> *Id.* ¶ 190.

<sup>198</sup> *Id.* ¶ 196.

<sup>199</sup> Some scholars argue that the “AFRC Appeals Judgment, by distinguishing the crime of forced marriage from the crime of sexual slavery, has the ironic effect of minimizing the sexual violence and enslavement that were the principle features of forced marriage in the Sierra Leone conflict. Gong-Gershowitz, *supra* note 73, at 54.

criminal law, was clearly a situation of sexual slavery.”<sup>200</sup> The decision has also been criticized for reinforcing stereotypes of women’s roles by defining cooking, cleaning, and other household duties of women as conjugal duties instead of forced labor.<sup>201</sup>

Although the *AFRC* Appeals judgment is helpful for parsing out the elements of forced marriage, forced marriage as it took place during the DK is factually different from the forced marriage that occurred in Sierra Leone.<sup>202</sup> Forced marriages in the Sierra Leone context were different for a number of reasons:<sup>203</sup> (1) they were usually perpetrated by the husband; (2) rape and sexual violence<sup>204</sup> were major components of

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<sup>200</sup> Karine Belair, *Unearthing the Customary Law Foundations of “Forced Marriages” During Sierra Leone’s Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women’s Rights in Post-Conflict Sierra Leone*, 15 *COLUM. J. GENDER & L.* 551, 553 (2006).

<sup>201</sup> “[T]he *AFRC* Appeals Judgment exaggerated the significance of so-called ‘conjugal duties’ such as cooking and cleaning to support its conclusion that ‘forced marriage’ is *not* predominantly a sexual crime. In so doing, the Appeals Chamber effectively incorporated centuries-old gender stereotypes of women’s work into the jurisprudence of international humanitarian law. This simply cannot and should not be the enduring legacy of the horrific suffering of women in armed conflict.” Gong-Gershowitz, *supra* note 73, at 60.

<sup>202</sup> See generally Gong-Gershowitz, *supra* note 73, at 55-57 (describing the background of the Sierra Leonean Civil War and the creation of the SCSL).

<sup>203</sup> Many scholars’ assessment of the SCSL Appeal’s Chamber decision illustrates the stark differences between the forced marriages that took place within Sierra Leone and those that took place in Cambodia. Gong-Gershowitz argues that the elements of sexual slavery neatly fit the events that took place in Sierra Leone. “First, the perpetrator (“husband”) exercised any or all of the powers attached to the right of ownership over his victim (“wife”), whereby not only was she held captive or not free to leave without fear of reprisal (deprivation of liberty), but also she was forced to perform gender-specific forms of labor, including cooking, cleaning and washing clothes. Second, *without exception*, the perpetrator regularly subjected his “wife” to sexual intercourse (rape) or forced her to engage in other sexual acts (sexual abuse) without her genuine consent. Third, the perpetrator abducted and forcibly kept his “wife” in captivity and sexual servitude with the intent to hold her indefinitely in that state.” *Id.* at 73 (emphasis added).

<sup>204</sup> “Physical and sexual violence were the dominant features committed against thousands of women and girls in Sierra Leone during the decade-long civil war . . . .” *Id.* at 75.

the martial relationship;<sup>205</sup> (3) the marriage was de facto and not de jure; and (4) the husbands subjected the wives to forced labor. Because of these differences, the elements of sexual slavery better capture the crime suffered by women in Sierra Leone while the elements of forced marriage aptly capture the crime suffered by men and women married during the DK.

During the Sierra Leone conflict, rape and sexual violence were major components of the relationship<sup>206</sup> between a rebel outlaw and his wife.<sup>207</sup> Often, the husband selected his wife after raping her. The brutal rapes and sexual violence inflicted upon women in Sierra Leone by their husbands, usually prior to and during “marriage” is reflected in the second element of sexual slavery: “[t]he perpetrator caused such person or persons to engage in one or more acts of a sexual nature.”<sup>208</sup>

Contrastingly, during the DK, sex outside of marriage was considered a moral offence punishable by death; therefore, rape and sexual violence<sup>209</sup> were not committed against the woman by her husband prior to marriage nor were they supposed to

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<sup>205</sup> Some scholars argue that perpetrators labeled their victims of wives to avoid charges of rape and sexual slavery. *See id.* at 63.

<sup>206</sup> Some scholars have even argued that applying the term forced marriage to Sierra Leone legitimizes the crimes committed during the marriage. *See* Belair, *supra* note 198, at 555-58.

<sup>207</sup> “A ‘forced marriage’ during the Sierra Leone conflict would begin when rebels attacked a village, wreaking violent havoc . . . . Girls were brutally gang raped vaginally and anally. They were often still virgins, only eleven or twelve years old. In this psychologically devastating context, ‘marriage’ would begin; a girl would be abducted and assigned to a combatant or commander.” Belair, *supra* note 198, at 555.

<sup>208</sup> ICC Elements of Crimes, art. 7 (1) (g)-2, Sept. 9, 2002, [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element_of_Crimes_English.pdf).

<sup>209</sup> Coercive measures that may have been sexually violent were not generally used against women unless they refused as opposed to marry. *Supra* Part III.C.

voluntarily have sexual relations.<sup>210</sup> Also, as previously discussed, some couples purposely avoided sexual relations even after being married. In these cases, the second element of sexual slavery is absent.

This difference stands in stark contrast to the sexually violent relationships between rebel husbands and their wives.<sup>211</sup> One victim, whose situation was characteristic of rebel wives, described how “she was completely at her ‘husband’s’ disposal sexually, made to do whatever he liked, whenever he liked: ‘He used to sex me twice every night.<sup>212</sup> He made me take his penis in my mouth. I tried to refuse him but he always threatened to kill me.’”<sup>213</sup>

Generally, rape and sexual violence were not used to create nor to sustain forced marriages under the DK in the same way that rebel husbands used them in Sierra Leone. Therefore, in the Cambodian context, the forced conjugal association itself was responsible for much of the psychological harm that both husband and wife endured.<sup>214</sup>

Another difference between the forced marriages in Sierra Leone and the DK is that DK forced marriages created “an exclusive marital relationship”<sup>215</sup> that was legally sanctioned by the state.<sup>216</sup> However, in Sierra Leone, the marriage was *de facto*.<sup>217</sup>

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<sup>210</sup> *Supra* note 8. Because forced labor was extremely important to the KR, women and men were often too tired and starved to engage in sex. *See generally* MAM, *supra* note 3 (concluding that men and women were only married after the KR had exhausted their ability to perform the most strenuous labor).

<sup>211</sup> *See generally* MAM, *supra* note 2 (concluding that men and women were only married after the KR had exhausted their ability to perform the most strenuous labor).

<sup>212</sup> *Id.*

<sup>213</sup> *See* Belair, *supra* note 198, at 555.

<sup>214</sup> *See supra* notes 22-49, 53 and accompanying text.

<sup>215</sup> *See* Jain, *supra* note 8, at 9 (“a relationship of exclusivity between the ‘couple’, with potential disciplinary repercussions for breach of the arrangement”).

<sup>216</sup> *Supra* notes 11-18.

<sup>217</sup> Jain, *supra* note 8, at 1026.

Because of the de facto status, and the reputation of the rebel husbands, wives were stigmatized for appearing to take up with the rebels<sup>218</sup> while marriages in Cambodia were sanctioned by the government and seen as legitimate by the community. This legitimacy validated the forced marriage and restrained many couples from separating even after the fall of the KR.

In Sierra Leone, there is even little evidence that the wives actually perceived themselves as married<sup>219</sup> and husbands often abandoned their wives when they “got tired of them, or when they became too ill to meet their demands.”<sup>220</sup> Rebel husbands thus treated their wives like property, illustrating the first element of sexual slavery: “the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons . . .”<sup>221</sup> Some scholars argue that the rebel husbands used the label “wife” not to reflect a marital relationship but to illustrate their ownership, dominion and control over their captive.<sup>222</sup> In Sierra Leone husbands freely disposed of their “property” at their desire, while in Cambodia, many of the couples generally did not have the luxury of severing the marriage with ease.<sup>223</sup>

Another reason that sexual slavery better describes the relationships between rebel husbands and wives in Sierra Leone is that rebel husbands subjected their wives to forced labor. The cooking, cleaning, laundry and other household duties performed by wives in

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<sup>218</sup> *Id.* (mentioning the stigmatization that women in Sierra Leone endured and how difficult it was for them to reintegrate into their communities).

<sup>219</sup> “[N]one of the witnesses whose testimony was set forth in the AFRC Trial judgment referred to their captors as ‘husbands.’” Gong-Gershowitz, *supra* note 73, at 68.

<sup>220</sup> Belair, *supra* note 198, at 557.

<sup>221</sup> ICC Elements of Crimes, art. 7 (1) (g)-2, Sept. 9, 2002, [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B68E5F9082543/0/Element_of_Crimes_English.pdf).

<sup>222</sup> *See* Gong-Gershowitz, *supra* note 73, at 76.

<sup>223</sup> *Supra* Part II.

Sierra Leone are better defined as forced labor as opposed to “conjugal duties,” further illustrating the first element of sexual slavery: “a similar deprivation of liberty.”

The *AFRC* trial chamber noted that forced labor is evidence of deprivation of liberty. Relying upon the Rome statute, the Chamber observed that:

the Working Group on the Elements of Crime took the view that the word “similar” in the first element (i) of the crime should not be interpreted as referring only to the commercial character of the examples of selling, purchasing, or bartering. These delegates insisted that Footnote 18 be appended to the Article, which states “[i]t is understood that such a deprivation of liberty may, in some circumstances, include extracting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.”<sup>224</sup>

Wives in the Cambodian context did not experience a similar deprivation of liberty by being forced to perform “conjugal duties.”<sup>225</sup> During the DK, eating was communal, babies were usually cared for by someone other than their mother, children old enough to work were usually put into a separate work unit and married couples only saw each other periodically.<sup>226</sup>

Sexual slavery fails to capture the elements of forced marriage in the Cambodian context. During the DK, it was the conjugal association itself that caused victim’s mental anguish and sexual slavery neglects to address the many harms that both husbands and wives endured because of the association.<sup>227</sup>

## ***V. Nullum Crimen Sine Lege***

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<sup>224</sup> *AFRC* Case, Case No. SCSL-04-16-T, Judgment, ¶ 709 n.1380 (June 6, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=vjmJCKSU01E%3d&tabid=173>.

<sup>225</sup> “In a short period of time, women’s role as caretaker of the family was communalized and child rearing became a public responsibility.” MAM, *supra* note 2, at 10;

<sup>226</sup> See generally MAM, *supra* note 2 (describing how the KR eliminated many traditional gender roles and duties such as caretaking and cooking).

<sup>227</sup> *Supra* Part II.

## A. Definition

The principle of *nullum crimen sine lege* (“*nullum crimen*”) dictates that forcing someone to enter into a conjugal association must have been “recognised as a crime entailing individual criminal responsibility under customary international law at the time” that the acts took place.<sup>228</sup> It is an affirmative defense that forms part of customary international law.<sup>229</sup> Therefore, in order to hold KR senior leaders responsible for forced marriage,<sup>230</sup> one must establish that individual criminal liability existed for forced marriage during the ECCC’s temporal jurisdiction of 1975-1979. To satisfy *nullum crimen*<sup>231</sup> forced marriage must meet three elements: (1) existence at the relevant time in a manner providing for individual liability; in a form (2) sufficiently specific to render the imposition of criminal sanctions for the acts of the accused foreseeable; and have (3) been accessible to the particular accused.<sup>232</sup>

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<sup>228</sup> Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Soldiers), ¶ 8 (May 31, 2004).

<sup>229</sup> See generally, CASSESE, *supra* note 126, at 36-40 (outlining the evolution of *nullum crimen* in international law); see also ECCC law, Chapter X (adopting Articles 14 and 15 of the ICCPR); see also RETHINKING INTERNATIONAL CRIMINAL LAW: THE SUBSTANTIVE PART 42 (Olaoluwa Olusanya ed., 2007) [hereinafter RETHINKING] (noting that the principle of *nullum crimen* is enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter on Human and People’s Rights).

<sup>230</sup> The crime of “forced marriage” need not have existed as a crime against humanity during the temporal jurisdiction of the court but only the “legal ingredients” which make up the crime of forced marriage—the actus reus and mens rea—must have existed. CASSESE, *supra* note 126, at 46.

<sup>231</sup> Jonas Nilsson argues that the principles of *nullum crimen* are “so interlinked that it might serve little purpose to try to deal with them separately. Relying upon case law from the European Court of Human Rights and the ICTY, Nilsson concludes that *nullum crimen* hinges on accessibility and foreseeability. RETHINKING, *supra* note 227, at 64. Referencing, *Cantoni v. France*, a European Court of Human Rights case, Cassese noted that accessibility and Foreseeability must be met to satisfy *nullum crimen* principles. CASSESE, *supra* note 126, at 45.

<sup>232</sup> *Supra* note 229.

## 1. Existence of the law at the relevant time

The Prosecution can establish whether a crime existed during the temporal jurisdiction of the court by examining traditional sources of law.<sup>233</sup> These sources include international conventions, customs, “general principles of law recognized by civilized nations,” and judicial decisions.<sup>234</sup> Because customary law “takes time to develop” it is difficult to say exactly when a “norm has crystallized”<sup>235</sup> and become part of customary international law.<sup>236</sup> Therefore, international instruments and jurisprudence occurring after the temporal jurisdiction of a court are nevertheless relevant for establishing a “period where customary law begins to develop.”<sup>237</sup>

## 2. Specificity and foreseeability

Specificity and foreseeability are closely associated.<sup>238</sup> The law or provision outlining a crime must be sufficiently specific to ensure that an individual could foresee criminal liability for his conduct;<sup>239</sup> however, “emphasis on conduct, rather than on the specific description of the offense in substantive criminal law, is of primary

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<sup>233</sup> International Court of Justice Statute, art. 38(1), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

<sup>234</sup> ICJ Statute, Article 38(1), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

<sup>235</sup> Although treaties are only binding upon contracting parties they can also be used as evidence of “crystallization of customary rules.” CASSESE, *supra* note 126, at 16.

<sup>236</sup> Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Soldiers), ¶ 50 (May 31, 2004).

<sup>237</sup> *Id.*

<sup>238</sup> See CASSESE, *supra* note 126, at 41 (observing that the purpose of the principle of specificity is that “all those who may fall under the prohibitions of the law . . . may [] foresee the consequences of their action and freely choose either to comply with, or instead breach, legal standards of behavior”).

<sup>239</sup> To satisfy the element of foreseeability, an individual does not have to know “with absolute certainty” the consequences of his conduct because “many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.” RETHINKING, *supra* note 227, at 44 (citing *Sunday Times v. The United Kingdom*, [1979] ECHR 6538/74, ¶ 49 (1979)).

relevance.”<sup>240</sup> Nevertheless, *nullum crimen* cannot be violated simply because an individual’s conduct was moral or appalling. The moral or appalling nature of the conduct merely combats foreseeability challenges because “if the crime is serious it is more likely that the perpetrator foresaw that what he did would render him criminally responsible.”<sup>241</sup>

Specificity and foreseeability do not preclude “refining and elaborating upon, by way of construction, *existing* rules.”<sup>242</sup> In *C.R. v. The United Kingdom*,<sup>243</sup> the European Court of Human Rights found a man guilty of marital rape although at the time criminal liability did not exist for marital rape.<sup>244</sup> The Court concluded—after examining the evolution of exceptions to a husband’s immunity as well as the evolution of the marital partnership<sup>245</sup>—that although their decision would change existing law, *nullum crimen* did not forbid “gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offense and could

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<sup>240</sup> Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Soldiers), ¶ 25 (May 31, 2004).

<sup>241</sup> RETHINKING, *supra* note 227, at 56.

<sup>242</sup> CASSESE, *supra* note 126, at 44 (citing Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000)), <http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>.

<sup>243</sup> RETHINKING, *supra* note 227, at 56 (citing *Sunday Times v. the United Kingdom*, [1979] ECHR 6538/74, ¶ 49 (1979)). Some scholars also argue that *United Kingdom* was a case in which the conduct was so serious that it was unlikely that the husband who admitted to the rape could not foresee that he might be held criminally liable for his conduct. *Id.* at 56.

<sup>244</sup> *C.R. v. the United Kingdom*, [1995] ECHR 20190/92, ¶ 49 (1995); *see* RETHINKING, *supra* note 229, at 47.

<sup>245</sup> The court noted that a paper written by the Law Commission observed that “[t]he rights and duties arising from marriage have, however, changed over the years as the law has adapted to changing social conditions and values. The more modern view of marriage is that it is a partnership of equals.” *C.R. v. the United Kingdom*, [1995] ECHR 20190/92, ¶ 24 (1995).

reasonably be foreseen.”<sup>246</sup> *C.R.* illustrates that the development of the law should not necessarily be hampered by foreseeability<sup>247</sup> where the “case law develops after the offence has taken place but before it is dealt with in court, or even when the behaviour is declared criminal for the first time in the case at hand.”<sup>248</sup>

### **3. Accessibility**

In order to hold individuals criminally liable, they must have had sufficient notice that their conduct was prohibited.<sup>249</sup> The Prosecution can establish accessibility by examining domestic and international jurisprudence as well as international instruments that existed at the relevant time period.<sup>250</sup> It is not necessary that the perpetrator knew that his conduct was unlawful but only that information establishing the illegality of his conduct was accessible to him.<sup>251</sup>

In Case 002, the defense can invoke *nullum crimen* to challenge a charge of forced marriage. If forced marriage fails to clear the *nullum crimen* hurdle, the Prosecution lacks power to assert it as a crime because the ECCC will lack subject matter jurisdiction.

### **B. Forced Marriage and *Nullum Crimen***

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<sup>246</sup> *Id.* ¶ 34.

<sup>247</sup> Cassese notes that judge-made law by its nature lacks rigidity, foreseeability, and certainty. He concludes that *CR v. United Kingdom* and its companion case *SW* illustrate the flexible nature of common law which international law most parallels. CASSESE, *supra* note 126, at 38.

<sup>248</sup> RETHINKING, *supra* note 227, at 55.

<sup>249</sup> RETHINKING, *supra* note 227, at 44 (quoting *Sunday Times v. the United Kingdom*, [1979] ECHR 6538/74, ¶ 49 (1979)).

<sup>250</sup> JARED L. WATKINS & RANDLE C. DEFALCO, *JOINT CRIMINAL ENTERPRISE AND THE JURISDICTION OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 6 (2008) (citation omitted).

<sup>251</sup> *Id.*

The specific crime of “forced marriage” need not have existed in name at the relevant time but merely the “legal ingredients” of the offense.<sup>252</sup> Therefore, the Prosecution must establish that being compelled by force, threat of force or coercion to marry was prohibited during the temporal jurisdiction of the ECCC.<sup>253</sup>

### **1. Compelled by force, threat of force or coercion**

All of the gender-based crimes illustrate the legal relevance of consent<sup>254</sup> and the illegality of using force, threat of force or coercion to override an individual’s autonomy.<sup>255</sup> With the exception of sexual slavery,<sup>256</sup> rape, enforced prostitution, and sexual violence all prohibit the use of force, threat of force or coercion to abridge an individual’s bodily autonomy.<sup>257</sup> Some scholars argue that the evolution of gender-based crimes shows a move from protecting women’s dignity<sup>258</sup> and honor to a paradigm

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<sup>252</sup> CASSESE, *supra* note 126, at 46 (“Courts may not create a new criminal offence, with new legal ingredients . . . . They can only adapt provisions envisaging criminal offences to changing social conditions—as long as this adjustment . . . is consonant with, or even required by, general principles.”).

<sup>253</sup> *Supra* Part III.

<sup>254</sup> “The doctrine of consent is based on the legal assumption that individuals are able to make rational and informed choices concerning their best interests, and that they do so in a neutral environment. Courts have begun to pay close attention to this assumption in the fields of torts, bioethics, and contracts because external factors can influence an individual’s ability to genuinely and voluntarily consent. The informed-consent doctrine in bioethics, for example, requires that individuals should be so ‘situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion.’” Boon, *supra* note 70, at 655.

<sup>255</sup> *Supra* Parts III.A., IV.A.

<sup>256</sup> Arguably, the deprivation of liberty needed to establish sexual slavery covers the issue of non-consent.

<sup>257</sup> *Supra* Part IV.

<sup>258</sup> “A litany of IHL provisions is explicitly designed to protect women from various forms of sexual violence. One of the essential references is found in the Fourth Geneva Convention: ‘Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.’ The Commentary interprets this specific proscription as arising from the general concern for

“based on broader principles of human dignity, autonomy, and consent.”<sup>259</sup> Comparing the text of the Geneva Convention with the ICC Statute<sup>260</sup> reveals a “gradual clarification of the [elements] of criminal liability” for rape.<sup>261</sup>

Arguably, an individual’s freedom of choice and consent is curtailed by the power of the state. Citizens are not unfettered in all decision making. However, considering the intimate relationship between a husband and wife, the social importance placed on the marital relationship and the right to consensual marriage that is enshrined in many international human rights instruments, consent and autonomy are as implicated in forced marriage as in the previously discussed gender-based crimes. Examining the evolution of gender-based crimes establishes that a prohibition against using force, threat of force or coercion to override an individual’s autonomy existed prior to the temporal jurisdiction of the ECCC: thus satisfying the *nullum crimen* principle.

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women's honor and ‘family rights,’ both somewhat antiquated notions when used in the context of sexual violence . . . . While the rights of individual women to maintain bodily integrity are implicated, they are almost consistently grounded in outdated notions of chastity and virtue. Again and again, the four Conventions and the Commentaries state that rape is ‘an attack on women’s honour’ or that women should be protected from being ‘forced into immorality by violence.’ Furthermore, the drafters of the Protocols in the 1970s introduced language that focuses less on “honor” and more on human dignity: ‘Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.’” Karima Bennoune, *International Justice and Shifting Paradigms: Article: Do We Need New International Law to Protect Women in Armed Conflict?*, 38 Case W. Res. J. Int’l L. 363 , 378-79 (2006-07).

<sup>259</sup> Boon, *supra* note 70, at 631.

<sup>260</sup> See Bennoune, *supra* note 256 (highlighting the discriminatory language in the Geneva Conventions and noting that “[i]nternational criminal courts can indeed promote progressive, creative interpretations of IHL’s key texts”).

<sup>261</sup> *Sunday Times v. the United Kingdom*, [1979] ECHR 6538/74, ¶ 34 (1979).

Note that although rape has existed as a criminal offence before the Nuremberg Charter, the elements of rape were not outlined until *Akayesu*. Gong-Gershowitz, *supra* note 73, at 58 (“Rape was expressly defined for the first time under international law in the landmark case of *Prosecutor v. Akayesu* . . . .”).

Although rape and sexual violence “have long been recognized as international crimes,”<sup>262</sup> the Nuremberg Charter lacked explicit prohibitions against any forms of sexual violence.<sup>263</sup> It was not until the four allied powers created Control Council Law No. 10<sup>264</sup> to guide post-war crimes trials in the occupied zones in Germany that rape was listed as a crime against humanity.<sup>265</sup> Control Council Law No. 10 Article II(1)(c) defined crimes against humanity as “[a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”<sup>266</sup> Therefore Control Council Law No. 10 demonstrates that three

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<sup>262</sup> Boon, *supra* note 70, at 626.

<sup>263</sup> But note that the trial record did contain evidence of sexual violence. 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, 300-01 (2003). Also, the Nuremberg Charter, Article 6(c) lists the crimes against humanity that were within the jurisdiction of the tribunal “murder, extermination, enslavement, deportation, and other inhumane acts.” Charter of the International Military Tribunal art. 6(c) (Aug. 8, 1945) [hereinafter Nuremberg Charter], <http://avalon.law.yale.edu/imt/imtconst.asp>.

<sup>264</sup> Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity, Allied Control Council Law No. 10, art. II(1)(c) (Dec. 10, 1945). Article II(1)(c) of Control Council Law No. 10 [hereinafter Control Council Law], <http://avalon.law.yale.edu/imt/imt10.asp>.

<sup>265</sup> However, other gender-based crimes were addressed. “In the trials of some of the so-called ‘lesser’ war criminals, such as medical doctors performing unethical experiments and concentration camp guards facilitating the commission of grave crimes within the camps, forced sterilization, forced abortion, and sexual mutilation were mentioned.” Askin, *supra* note 19, at 301-02.

<sup>266</sup> Control Council Law, *supra* note 262, art. II(1)(c), <http://avalon.law.yale.edu/imt/imt10.asp>.

decades prior<sup>267</sup> to the temporal jurisdiction of the ECCC, rape was recognized as a crime against humanity.

The Tokyo Tribunal prosecuting Japanese for WWII crimes did not list rape as a crime in its charter; however, it did prosecute the rape of women and other civilians as an affront to family honor and inhumane treatment and prosecuted such gender-based crimes under the war crimes provision of the charter.<sup>268</sup>

Following WWII, the Geneva Conventions were amended to provide better protection to civilian populations.<sup>269</sup> The Geneva Convention IV of 1949 thus captures the international norms that were created as a result of the violence committed upon civilians during WWII.<sup>270</sup> Article 27 of the Geneva Convention IV of 1949, which is universally binding on all countries and considered customary international law,<sup>271</sup> prohibits not only rape<sup>272</sup> but also enforced prostitution and any other indecent assault, stating that

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<sup>267</sup> Many scholars would agree that the prohibition of rape dates further back than WWII. *See* Askin, *supra* note 19, at 299-300 (arguing that as early as the 1300s “[l]ong before international humanitarian law was codified, the customs of war prohibited rape crimes”).

<sup>268</sup> Askin, *supra* note 19, at 302.

<sup>269</sup> *See* Geneva Convention Commentary, art. 27, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (denouncing “certain practices which occurred, for example, during the last World War, when innumerable women of all ages, and even children, were subjected to outrages of the worst kind: rape committed in occupied territories, brutal treatment of every sort, mutilations etc”), <http://www.icrc.org/ihl.nsf/COM/380-600032?OpenDocument>.

<sup>270</sup> “In response to the systematic slaughter and persecution of millions of civilians during World War II, the original Geneva Conventions were deemed inadequate.” Askin, *supra* note 19, at 304.

<sup>271</sup> *Id.* at 303.

<sup>272</sup> International tribunals have also used rape as evidence of a grave breach of the Geneva Convention. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 172 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (“Rape may also amount to a grave breach of the Geneva Conventions . . . if the requisite elements are met, and

Protected persons are entitled, in all circumstances, to *respect for their persons, their honour*, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any *attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault*.<sup>273</sup> (emphasis added)

In 1977, two Additional Protocols were added to the Geneva Conventions.

Additional Protocol I governs the treatment of civilians, belligerents and prisoners of war during international conflicts while Additional Protocol II governs the treatment of the same individuals during non-international armed conflicts. Both protocols explicitly prohibit rape and enforced prostitution.<sup>274</sup> Article 76(1) of Protocol I states, “[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”<sup>275</sup> while Article 4(2)(e) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault.”<sup>276</sup> Therefore, the prohibition of rape, enforced prostitution and any other form of indecent assault during

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may be prosecuted accordingly.”), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

<sup>273</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 27, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5>.

<sup>274</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977 [hereinafter Geneva Protocol I], <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977 [hereinafter Geneva Protocol II], <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>.

<sup>275</sup> Protocol I, *supra* note 272, art. 76(1).

<sup>276</sup> Protocol I, *supra* note 272, art. 4(2)(e).

armed conflicts was a customary international norm prior to the temporal jurisdiction of the ECCC.<sup>277</sup>

The Geneva Conventions of 1949,<sup>278</sup> the jurisprudence following WWII and the jurisprudence that subsequently came out of the international tribunals<sup>279</sup> demonstrate that criminal liability for gender-based crimes existed prior to the ECCC's temporal jurisdiction. Rape, a gender-based crime that embodies the evolution of consent and autonomy, undoubtedly satisfies *nullum crimen*: 1) it existed as a crime during the temporal jurisdiction of the ECCC; 2) was specific and foreseeable; and 3) was accessible to the Accused.

Although a legal definition for rape addressing the issue of consent did not exist until the ICTR's decision in *Akayesu*,<sup>280</sup> there was a "refining and elaborating upon, by way of construction, *existing* rules" so that rape as a crime against humanity became not a violation of a woman's dignity but a violent act committed against her in circumstances where consent could not genuinely be given.<sup>281</sup> Like *C.R.* and the marital exception for

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<sup>277</sup> Although Additional Protocol II supplemented the Conventions in 1977, the language mirrors the IV Geneva Convention of 1949. *Supra* notes 269-76 and accompanying text.

<sup>278</sup> Cambodia became a party to the Geneva Conventions of 1949 on Aug. 12, 1958, long before the temporal jurisdiction of the ECCC. International Committee of the Red Cross, *International Humanitarian Law-State Parties/Signatories*, ICRC, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited Aug. 17, 2010).

<sup>279</sup> Although the jurisprudence from the international tribunals dates after the ECCC's jurisprudence, there have been no major international agreements or resolutions between WWII and the international tribunals' decisions regarding gender-based crimes. Therefore, the tribunals' decisions are indicative of customary international law during the ECCC's jurisdictional years of 1975-1979.

<sup>280</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

<sup>281</sup> *Id.*; CASSESE, *supra* note 126, at 44 (citing Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000)), <http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>.

rape, rape embodying the issue of consent has evolved through jurisprudence occurring after the ECCC's temporal jurisdiction. Although this evolution occurred after the temporal jurisdiction of the ECCC, the legal relevance of consent as it relates to individual autonomy is "consistent with the essence of rape."<sup>282</sup> Therefore, the element of force, threat of force or coercion should pass the *nullum crimen* test: 1) it existed as a rule at the relevant time even though it was refined by jurisprudence occurring after the temporal jurisdiction of the court;<sup>283</sup> (2) it is specific enough that an accused could foresee that using force, threat of force or coercion would be criminally prohibited; and (3) relying upon the instruments and international jurisprudence previously discussed, the Accused should have had sufficient notice that his conduct was prohibited.

## **2. Conjugal association and *nullum crimen***

The right to choose one's spouse was embodied in many international human rights instruments prior to the temporal jurisdiction of the ECCC. Some scholars contend that charging forced marriage "cloud[s] important differences between forced marriages that amount to violations of international human rights law from those that constitute crimes against humanity."<sup>284</sup> However, Antonio Cassese maintains that "[c]rimes against humanity [are] to a great extent predicated upon international human rights law."<sup>285</sup> Because international human rights law provides clues to what constitutes a crime against humanity, surveying international human rights instruments that embody the right to choose one's spouse helps to determine whether *nullum crimen* is satisfied.<sup>286</sup>

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<sup>282</sup> See *Sunday Times v. the United Kingdom*, [1979] ECHR 6538/74, ¶ 34 (1979).

<sup>283</sup> See *id.*; *supra* Part V.A, V.A.1.

<sup>284</sup> Gong-Gershowitz, *supra* note 73, at 70.

<sup>285</sup> CASSESE, *supra* note 126, at 99.

<sup>286</sup> Gong-Gershowitz, *supra* note 73, at 70; CASSESE, *supra* note 126, at 99; *supra* Part V.

“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.”<sup>287</sup> The Universal Declaration of Human Rights,<sup>288</sup> long considered “a common standard of achievement”<sup>289</sup> for all peoples and all nations,<sup>290</sup> frames the right to freely choose one’s spouse:

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.<sup>291</sup>

Although not legally binding on member states, the UDHR is considered customary international law.<sup>292</sup> It articulates a core set of fundamental rights and also spurred the creation of “60 international human rights instruments, which together constitute a comprehensive system of legally binding treaties for the promotion and protection of

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<sup>287</sup> Toy-Cronin, *supra* note 1, at 563.

<sup>288</sup> “It sets out, for the first time, fundamental human rights to be universally protected.” United Nations, *Universal Declaration of Human Rights*, UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/en/udhr/pages/introduction.aspx> (last visited Aug. 17, 2010).

<sup>289</sup> *Id.*

<sup>290</sup> Often the UDHR is criticized for embodying Western standards of human rights; however, 20 years after the drafting of the UDHR at the International Conference on Human Rights in Tehran, “the majority of non-Western, non-white, and non-affluent states solemnly proclaimed: ‘The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community.’” PAUL GORDEN LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 258 (1998) (citation omitted).

<sup>291</sup> Universal Declaration of Human Rights art. 16, *adopted* Dec. 10, 1948, <http://www.un.org/en/documents/udhr/>.

<sup>292</sup> United Nations, *A United Nations Priority*, UNIVERSAL DECLARATION OF HUMAN RIGHTS, <http://www.un.org/rights/HRToday/declar.htm> (last visited Aug. 17, 2010).

human rights.”<sup>293</sup> One of these legally binding treaties is the International Covenant on Civil and Political Rights (“ICCPR”) which also recognizes the right to choose one’s spouse prior to 1975.

The International Covenant on Civil and Political Rights<sup>294</sup> is a binding treaty<sup>295</sup> that was opened for signature in December 1966 and entered into force in March 1976. Article 23(3) states that “[n]o marriage shall be entered into without the free and full consent of the intending spouses.”<sup>296</sup> Cambodia signed the treaty on October 17, 1980, after the temporal jurisdiction of the ECCC.<sup>297</sup>

The ICCPR which outlines a number of civil and political rights has 166 parties and 72 signatories. The ICCPR has been overwhelmingly supported by a vast range of countries. However, some states consider certain provisions of the ICCPR as contentious. One of these provisions is Article 23. Several countries have expressed reservations<sup>298</sup> against Article 23. Israel, Kuwait and the United Kingdom on behalf of the Solomon Islands territory have all reserved the right to personally address issues

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<sup>293</sup> *Id.*

<sup>294</sup> The ICCPR is monitored by the Human Rights Committee and parties to the treaty must submit regular reports. United Nations, *Human Rights Committee*, OHCHR, <http://www2.ohchr.org/english/bodies/hrc/index.htm> (last visited Aug. 17, 2010).

<sup>295</sup> United Nations, UNTC, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=enhttp://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=enhttp://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Aug. 17, 2010).

<sup>296</sup> *Id.*

<sup>297</sup> Note that although Cambodia signed in 1980, it didn’t accede to the ICCPR until May 26, 1992. *Id.*

<sup>298</sup> Egypt opposes the ICCPR in general so far as it conflicts with Islamic Sharia law. *See id.*

related to marriage based on their domestic law and religious beliefs.<sup>299</sup> However, other countries have objected to these reservations.<sup>300</sup>

The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (“Marriage Convention”)<sup>301</sup> Article 1(1) states that “[n]o marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.”<sup>302</sup> The Marriage Convention<sup>303</sup> has yet to be signed by Cambodia.<sup>304</sup> It entered

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<sup>299</sup> See generally *id.* (listing countries’ declarations and reservations).

<sup>300</sup> The governments of the Netherlands, Portugal, Czech Republic, Estonia, Canada, Australia, Ireland, Italy, Poland, Sweden, Hungary, Mexico and other countries objected to vague reservations made by Bahrain concerning Article 23. In 2006, Bahrain sought to “subject [] the provisions of [articles 3, 18, and 23 to] Islamic Shariah” law; however, the UN Secretary-General rejected the reservation because of the objections deposited by countries. *Id.* (“[T]hese reservations lead to differentiation in enjoyment of the rights warranted in the Covenant, which is incompatible with the purpose and object of the Covenant and therefore not permitted (article 19 c) of the Vienna Convention on the Law of Treaties.”). *Id.*

<sup>301</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, art. 1(1), *opened for signature* Nov. 7, 1962, 521 U.N.T.S. 231 (entered into force Dec. 19, 1964 [hereinafter The Marriage Convention]).

<sup>302</sup> *Id.*

<sup>303</sup> The Marriage Convention was intended to curtail child marriages and has received a fair amount of criticism because of Article 1(2) which allows for one party to be absent from the marriage ceremony under exceptional circumstances; however, the notion that parties should not be forced to marry is still embedded in Article 1(1). See Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 AM. U.J. GENDER SOC. POL’Y & L. 233, 249-50 (2004).

<sup>304</sup> United Nations, UNTC, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVI-3&chapter=16&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&lang=en).

into force<sup>305</sup> two years prior to the ICCPR in 1964.<sup>306</sup> Currently, only Bangladesh has entered a reservation that challenges “the full and free consent of both parties” clause.<sup>307</sup>

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) also guarantees the right to freely choose “a spouse and to enter into marriage only with their free and full consent.”<sup>308</sup> Although CEDAW was created specifically to protect the rights of women, it still reflects the right to consensual marriage. CEDAW is hailed as “a single, comprehensive and internationally binding instrument to eliminate discrimination against women.”<sup>309</sup> Nonetheless, CEDAW is often criticized for the number of reservations entered by states.

Article 16 of CEDAW governs equality in marriage and family life. In trying to ensure equality and eliminate discrimination Article 16 seeks to ensure that husbands and wives have “[t]he same rights and responsibilities during marriage and at its dissolution,

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<sup>305</sup> *See id.*

<sup>306</sup> *Id.*

<sup>307</sup> “The Government of the People’s Republic of Bangladesh reserves the right to apply the provisions of articles 1 and 2 in so far as they relate to the question of legal validity of child marriage, in accordance with the Personal Laws of different religious communities of the country.” *Id.* See also Finland and Sweden’s objections to Bangladesh’s reservation, arguing that “according to well-established international law, a reservation incompatible with the object and purpose of a treaty shall not be permitted.” *Id.*

<sup>308</sup> CEDAW, art. 16(1)(b), *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981), <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (last visited Aug. 9, 2010). A declaration which addressed discrimination against women preceded CEDAW. Members of the Commission on the Status of Women began drafting the Declaration on the Elimination of Discrimination Against Women in 1965 and the UN General Assembly adopted it on Nov. 7, 1967. UN Division for the Advancement of Women, *Short History of CEDAW Convention*, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, <http://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited Aug. 9, 2010).

<sup>309</sup> *See* UN Division for the Advancement of Women, *Short History of CEDAW Convention*, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, <http://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited Aug. 9, 2010).

[t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children . . . and the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”<sup>310</sup>

Many states,<sup>311</sup> particularly those that practice arranged marriages have entered reservations for Article 16. However, the majority of these states’ reservations were not entered against the right to consensual marriage further<sup>312</sup> illustrating that international human rights law concerning consensual marriage was developing prior to CEDAW..

Analyzing these international human rights instruments, most of which entered into force before the temporal jurisdiction of the ECCC, one could argue that it was foreseeable to the KR that their conduct was prohibited by the international community.<sup>313</sup> Moreover, the egregious nature of the crime—forcing two people, sometimes at the threat of death to enter into a lifelong partnership—further supports the

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<sup>310</sup> Article 16 outlines other rights. CEDAW, art. 16(1)(b), *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981), <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

<sup>311</sup> States that have entered reservations for Article 16 generally include Qatar, the Syrian Arab Republic, Tunisia, United Kingdom of Great Britain & N. Ireland, Monaco, Morocco, Niger, Oman, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Malaysia, Malta, Mauritania, Micronesia, Bangladesh, Egypt, France and Ireland. United Nations, CEDAW, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en) (last visited Aug. 9, 2010).

<sup>312</sup> States that have entered reservations specifically against Article 16(1)(b) are Algeria, Bahrain, Israel, Singapore, Thailand and the United Arab Emirates. *Id.*

<sup>313</sup> Note also that there is an Optional Protocol to the ICCPR wherein the Human Rights Committee has the power to receive complaints from victims alleging violations of the ICCPR. The protocol entered into force in 1976. Cambodia signed in 2004 but has failed to ratify. The Optional Protocol has 113 parties and 35 signatories. United Nations, UNTC, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en) (last visited Aug. 17, 2010).

foreseeability element. The element—the right to freely choose one’s spouse—is specific enough to actuate foreseeability. Lastly, because the UDHR, the ICCPR and the Marriage Convention entered into force prior to the temporal jurisdiction of the ECCC and were available to the international community, the KR had access to the prohibition.

Nonetheless, it is questionable whether criminal liability for violating an individual’s right to freely choose one’s spouse existed during the temporal jurisdiction of the ECCC.<sup>314</sup> Although none of the instruments examined explicitly provide for criminal liability “it is not necessary for [] individual criminal responsibility of the accused to be explicitly stated in a convention for the provisions of the convention to entail individual criminal responsibility under customary international law.”<sup>315</sup>

### **C. Conclusion**

The *nullum crimen* barrier is a significant hurdle to surmount. It may be difficult for the Prosecution to establish that criminal liability existed for forced marriage during the temporal jurisdiction of the ECCC. Although the force, threat of force or coercion element of forced marriage easily passes the *crimen nullum* test, it may be problematic to establish that individual criminal liability existed for non-consensual marriage at the relevant time. If the Prosecution can establish that criminal liability existed, the prohibition against non-consensual marriage should pass the foreseeability/specificity and accessibility elements of *nullum crimen*.

## **VI. Charging Forced Marriage as an Other Inhumane Act**

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<sup>314</sup> See *supra* notes 240-44.

<sup>315</sup> Prosecutor v. Kayishema, Case No. ICTR-95-1, Judgment, ¶ 149 (May 21, 1999).

Even if *nullum crimen* obstacles can be overcome, the Prosecution will have to combat arguments that forced marriage and sexual slavery are indistinguishable.<sup>316</sup> In 2008, the ICC's Pre-Trial Chamber I<sup>317</sup> concluded that "sexual slavery also encompasses situations where women and girls are forced into 'marriage,' domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors." However, as discussed in Section IV(B)(3) the Prosecution can legitimately address these critiques and potentially conflicting jurisprudence<sup>318</sup> by pointing out the differences between forced marriage as it took place in Sierra Leone, Rwanda and Uganda, and forced marriage as it took place in Cambodia under the KR.<sup>319</sup>

The Prosecution will also have to combat arguments that forced marriage is doctrinally inseparable from arranged marriages during peacetime.<sup>320</sup> This argument, as applied to forced marriage as a crime against humanity is flawed. Even many advocates of traditionally arranged marriage would argue that threatening future spouses with death

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<sup>316</sup> Note that although enforced prostitution exists as a separate crime in the Rome statute and the SCSL and that it has been acknowledged as an OIA by the ICTY, that it has not been charged by any of these tribunals. *Supra* Part IV.B.1.

<sup>317</sup> Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 431 (Sept. 30, 2008). Although ICC jurisprudence is not binding on the ECCC, Article 9 of the Framework Agreement Between Cambodia & The United Nations (2003) states that the ECCC's subject matter jurisdiction as it relates to crimes against humanity will be determined "as defined in the 1998 Rome Statute of the International Criminal Court . . ." Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, UN-Cambodia, art. 9, June 6, 2003.

<sup>318</sup> See *supra* Part IV.B.3. Although the jurisprudence of other tribunals is not binding on the ECCC, it is nonetheless persuasive authority.

<sup>319</sup> *Supra* Part IV.B.3.

<sup>320</sup> See Gong-Gershowitz, *supra* note 73, at 59. "[T]he Appeals Chamber put undue emphasis on parental consent as the key factor distinguishing arranged marriage in peacetime and forced marriages during armed conflict. This raises a variety of troublesome issues discussed below, including inconsistency with the definition of 'forced marriage' under international human rights law." *Id.*

for refusing to marry is generally not a defining feature of arranged marriages.<sup>321</sup>

Moreover, although some parents may use force, threat of force or coercion, arranged marriages during peacetime<sup>322</sup> are not analogous to forced marriages because the “former are not carried out in the context of a widespread or systematic attack against the civilian population, an element which must be present for forced marriage to be prosecuted as a crime against humanity.”<sup>323</sup>

### **VIII. Conclusion**

It is notable that survivors of forced marriage who were interviewed by the writer expressed that they believed that forced marriage should be a crime because marriages pre-KR were different from forced marriages during the DK.<sup>324</sup> The survivors provided numerous reasons as to why forced marriage during the DK was different: 1) during the KR period you could not deny their order to marry because denial could lead to death,<sup>325</sup> 2) often you were forced to marry someone you had never met the very day that you were

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<sup>321</sup> “A widely held myth is that young people cannot turn down a potential suitor.” Gail Rosenblum, *Myths and Facts About Arranged Marriage*, STAR TRIBUNE, Feb. 8, 2008, <http://www.startribune.com/lifestyle/family/15439136.html>. “According to Cambodian custom it is important that parents ask their daughters how they feel about a marriage proposal. Although the daughter will usually heed her parent’s advice, if she refuses to marry, the proposal will be rejected. In contrast to this, women during the DK period were rarely given the opportunity to choose their own husbands, their fate sealed by complete strangers.” MAM, *supra* note 2, at 60.

<sup>322</sup> However, note that even advocates of traditionally arranged marriages would contend that force, threat of force or coercion are not elements of traditionally arranged marriages. *Supra* note 320.

<sup>323</sup> Jain, *supra* note 8, at 228.

<sup>324</sup> Even the gentleman who was lucky enough to provide input in choosing his spouse, adamantly explained why arranged marriages pre-KR time were different from forced marriages during the DK. Interview with Mr. Sao Kimseng, farmer, in Pursat Province (June 13, 2010).

<sup>325</sup> Interview with Mrs. Naom Morm, survivor of forced marriage, in Pursat Province (June 12, 2010).

informed that you were getting married;<sup>326</sup> and 3) after being forced to marry, they were worked so hard and had to live separately so they rarely saw their spouse.<sup>327</sup> These survivors have no knowledge of international criminal law and no knowledge of the ongoing dialogue surrounding sexual slavery and forced marriage; they are articulating their experience of the harms they have suffered.

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<sup>326</sup> Interview with Mr. Nherk Morn, survivor of forced marriage, in Pursat Province (June 12, 2010).

<sup>327</sup> Interview with Mrs. Chheum Chansy, survivor of forced marriage/farmer, in Pursat Province (June 13, 2010).