

# **‘Forced Marriage’ in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes**

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*In 2008, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) found “forced marriage” to be a new crime against humanity, distinct from the crime of sexual slavery. With expert evidence on the abduction and forced labour of women and girls during the extended conflict in Sierra Leone, the SCSL found such forced conjugal association to be part of the widespread or systematic attack on the civilian population in Sierra Leone. This article examines the Court’s decision in the context of developments of international criminal law and with comparisons to similar gender violence in Liberia, Rwanda, Uganda and the Democratic Republic of Congo. The author argues that practices described as “forced marriage” in these conflict situations ought to be charged as “enslavement” and not a new crime against humanity – the other inhumane act of forced marriage.*

*En 2008, la Chambre d’appel du Tribunal spécial pour la Sierra Leone (TSSL) a statué que le « mariage forcé » était un nouveau crime contre l’humanité, distinct du crime d’esclavage sexuel. Se fondant sur la preuve d’experts sur l’enlèvement et le travail forcé des femmes et des filles pendant le long conflit en Sierra Leone, le TSSL a conclu que ce genre d’association conjugale forcée faisait partie d’une attaque systématique et répandue de la population civile de la Sierra Leone. Cet article examine la décision du Tribunal dans le contexte des développements du droit pénal international, et à la lumière d’actes de violence envers les femmes au Liberia, au Rwanda, en Ouganda et dans la République démocratique du Congo. L’auteur suggère que les pratiques décrites comme « mariage forcé » dans ces situations de conflit devraient être poursuivies sous le crime d’« esclavage » et non comme un nouveau crime contre l’humanité.*

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## I. Introduction

Women's experiences of being kidnapped by rebels or soldiers, raped, confined, forced to provide domestic services, impregnated, and controlled during the war in Sierra Leone have been variously called the 'bush wife' phenomenon<sup>2</sup>, sexual slavery, extreme cruelty, forced marriage or enslavement. These terms are used in colloquial and in legal contexts and their usage signals different levels of proof for those charged with crimes nationally or internationally or for those seeking reparations for their victimization. They also carry different connotations for victims and survivors. In other countries – Uganda, Liberia and Rwanda, for example – similar practices in conflict situations have been called mass rape, rape as a tool of genocide or weapon of war, the 'comfort women' phenomenon, sexual slavery or 'forced marriage'.

The kidnapping, rape, forced impregnation and assault of women during war are not new phenomena. Indeed, scholars have documented the role of sexual violence and other gender crimes in conflict situations in historical contexts related to war and enslavement.<sup>3</sup> Holding perpetrators responsible for those crimes against women, however, is a relatively new phenomenon in international criminal law.<sup>4</sup> Even after the Second World War, the Japanese commanders and soldiers who sexually enslaved women were not prosecuted for mass rapes of the so-called 'comfort women',<sup>5</sup> and during the Nuremberg

<sup>2</sup> Expert evidence from Zainab Bangura in *Prosecutor v Alex Tamba Brima*, SCSL-2004-16-T, Prosecution Filing of Expert Report Pursuant to Rule 94(bis) and Decision on Prosecution Request for Leave to Call an Additional Expert Witness (8 August 2005) (Special Court for Sierra Leone) online: <<http://www.sc-sl.org/scsl/Public/SCSL-04-16-PT-AFRC/SCSL-04-16-T-369.pdf>>.

<sup>3</sup> Valerie Oosterveld, "Sexual Slavery and the International Criminal Court: Advancing International Law" (2004) 25 *Mich J Int'l L* 605 at 607 [Oosterveld, "Sexual Slavery"]; Neha Jain, "Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution" (2008) 6 *J Intr'l Crim J* 1013 [Jain]; Paul Lovejoy, "Internal Markets or an Atlantic-Sahara Divide? How Women Fit into the Slave Trade of West Africa" in John Laband, ed, *Daily lives of civilians in wartime Africa: from slavery days to Rwandan genocide* (Westport, CT: Greenwood Press, 2007) at 18 [Lovejoy, "Internal Markets"]; Liberia, Truth and Reconciliation Commission of Liberia, *Final Report* (Liberia: Truth and Reconciliation Commission of Liberia, 2009), online: Truth and Reconciliation Commission of Liberia <<http://trcofliberia.org/reports/final-report>>.

<sup>4</sup> Binaifer Nowrojee, "Making the Invisible War Crimes Visible: Post-Conflict Justice for Sierra Leone's Rape Victims" (2005) 18 *Harv Hum Rts J* 85 [Nowrojee, "Making the Invisible"]; Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law" (2000) 46 *McGill LJ* 217 [Copelon, "Gender Crimes"].

<sup>5</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic rape, sexual slavery and slavery-like practices during armed conflict: final report* submitted by Gay J McDougall, Special Rapporteur, UNESCOR, 50th Sess, UN Doc E/CN.4/Sub/2/1998/13, (1998) [McDougall].

trials, Nazi leaders were not subject to criminal prosecution in relation to sexual crimes.<sup>6</sup>

As the *Geneva Conventions* and international humanitarian law developed, rape and sexual slavery (but not forced marriage) were included in war crimes and crimes against humanity.<sup>7</sup> Navanethem Pillay, current United Nations High Commissioner for Human Rights, states, “there has been a quantum leap forward in the prosecution of sexual violence before international tribunals. The jurisprudence of these courts represented a watershed for women whose wartime suffering had long been considered as an inevitable by-product of conflict, or as ‘collateral damage’ that could be more easily tolerated and, consequently, disregarded”.<sup>8</sup> Forced marriage is one example of such jurisprudential evolution. Because international law had not previously listed forced marriage as a specific crime, the decisions of the Trial and Appeals Chambers of the Special Court for Sierra Leone (SCSL) on forced marriage are groundbreaking and complicated.

In this article, I explore the crime of forced marriage in conflict situations and argue that the practices referred to as forced marriage in war ought to be charged as enslavement in international law and not a new separate crime.<sup>9</sup> Secondly, I address throughout some of the critiques of international prosecutions of gender crimes that have emerged in the literature in the past five years, in particular those concerning the complexities of victimhood as presented in trials.<sup>10</sup> Kamari Clarke provokes us to think critically about the international justice project in which we are engaged as scholars and activists, and our responsibility to the survivors, communities and victims:

Through its texts, transcripts, images, videos, legal procedures, and performances, the [International Criminal] court institutionalizes victimhood in mediated ways that are also familiarly racialized as “African”. What is not made explicit ... are the narratives of victim suffering: the child soldier and his or her status as victim are referentially signaled but never present in the substantive presence of the court.

<sup>6</sup> Luis Moreno-Ocampo, “Keynote Address - Interdisciplinary Colloquium on Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence” (2010) 35:4 *Law & Soc Inquiry* 839 at 842.

<sup>7</sup> *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287, 6 UST 3516 (entered into force 21 October 1950) [*Fourth Geneva Convention*]; Valerie Oosterveld, “The Special Court for Sierra Leone’s Consideration of Gender-based Violence: Contributing to Transitional Justice?” (2009) 10 *Hum Rts Rev* 73 at 81 [Oosterveld, “Transitional Justice”]; Doris Buss “Rethinking ‘Rape as a Weapon of War’” (2009) 17 *Fem Leg Stud* 145.

<sup>8</sup> Navanethem Pillay, “Address - Interdisciplinary Colloquium on Sexual Violence as International Crime: Sexual Violence: Standing by the Victim” (2010) 35:4 *Law & Soc Inquiry* 847 at 848.

<sup>9</sup> Most readers are more familiar with ‘forced marriage’ as marriage without consent of one or both spouses. This topic is very much a live policy issue in Canada and Britain – but beyond the scope of this paper.

<sup>10</sup> Buss, *supra* note 7; Kamari Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009) [Clarke]; Katherine Franke, “Gendered Subjects of Transitional Justice” 15 *Colum J Gender & L* 813.

Instead, articulated through their legal representatives, the violation of individuals and communities is negated and, ... comes to exist as a specter of suffering, a “ghost”.<sup>11</sup>

Finally, since this work forms part of a larger, collaborative project with partners in five countries, I will explore the importance of empirical research on this and other topics concerning women’s experiences of trauma in conflict situations. I briefly present the empirical context through case studies of forced marriage in Sierra Leone, Liberia, Uganda, Rwanda and the Democratic Republic of Congo (DRC). Non-governmental organizations working with survivors of sexual and other violence in these countries have much to offer to both the law-making process and scholarship on gender violence in war. While enslavement of women in war for the purposes of forced marriage is related to existing gender systems and marriage practices before conflicts in each of these countries, I will not discuss marriage without consent in times of peace.<sup>12</sup> This article concerns international criminal law prosecutions for forced marriage.

## II. Forced Marriage in International Law

In international human rights law and many domestic legal regimes, forced marriage refers broadly to cases where one or both spouses are married without their full and free consent. The 1962 *Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriage* as well as the 1979 *Convention on All Forms of Discrimination Against Women* call on governments to prohibit child marriage and require full and free consent to marriage.<sup>13</sup> Whether these marriages can be considered slavery depends on the conditions at the time of the marriage and also whether “the powers attaching to the right of ownership” are exercised over the spouse, as required by the 1926 definition of slavery.<sup>14</sup>

Historically, servile forms of marriage, whether in the context of war or not, can be included in the definition of slavery. The 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*<sup>15</sup> includes child exploitation and marriage without the right to refuse

<sup>11</sup> Clarke, *ibid* at 107.

<sup>12</sup> Catherine Dauvergne & Jenni Millbank, “Forced Marriage as a Harm in Domestic and International Law” (2010) 73:1 Mod L Rev 57.

<sup>13</sup> *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November 1962, 986 UNTS 393 (entered into force 1964); *Convention on the Elimination of all Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (Registered *ex officio* 3 September 1981).

<sup>14</sup> 1926 *Slavery Convention*, 25 September 1926, 60 LNTS 253 (entered into force 1927). Article 1 of the *Slavery Convention* reads, “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”).

<sup>15</sup> *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to*

where consideration is exchanged as forms of slavery as defined in the *Slavery Convention* of 1926.<sup>16</sup> Here the language is “given in marriage” for money or consideration (not “taken for marriage”), “transferred” or “inherited”, indicating that the target of this prohibition was families treating girls and women as chattel. In other words, the 1956 *Supplementary Convention* was not imagining in this section enslavement in war for forced marriage, but familial and community practices. Nonetheless, I would argue both the 1926 and 1956 Conventions support the interpretation of contemporary forced marriage in conflict situations being prosecuted as slavery when certain factors are included.

Despite the recognition that servile marriage is a form of slavery, the prosecution strategies and judicial decisions of the International Criminal Court (ICC) and the Special Court for Sierra Leone (SCSL) do not yet show a coherent approach or theory for holding perpetrators responsible for practices of forced marriage. While the international legal standards are clear that the constituent elements under the rubric of forced marriage – such as torture, rape, sexual slavery and forced impregnation – are crimes against humanity, it is not clear whether the totality of crimes amounts to slavery, sexual slavery or some other inhumane act. The academic commentary is also mixed in assessing the relative merits of charging forced marriage as slavery or as a new separate crime. If forced marriage is considered a form of slavery, it is seen as the most serious crime against humanity with global prohibition.<sup>17</sup> On the other hand, to be prosecuted successfully as a form of slavery, the court must find that the perpetrator had powers attaching to ownership over a person (1926 *Slavery Convention*) or a similar deprivation of that person’s liberty (*Rome Statute*).<sup>18</sup>

The Appeals Chamber of the SCSL, for example, found that the practices described as forced marriage constituted a separate crime against humanity, as another inhumane act.<sup>19</sup> The Trial Chamber in that case, known as the Armed

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*Slavery*, 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957).

<sup>16</sup> See Jean Allain, “On the Curious Disappearance of Human Servitude from General International Law” (2009) 11 *J Hist Int’l L* 303 [Allain, “Human Servitude”]; and Jean Allain, “*Hadijatou Mani Koraou v. Republic of Niger*” (2009) 103 *Am J Int’l L* 311 [Allain, “*Koraou v Niger*”].

<sup>17</sup> Joel Quirk, “Ending Slavery in all its Forms: Legal Abolition and Effective Emancipation in Historical Perspective” (2008) 12:4 *Int’l JHR* 529 at 532.

<sup>18</sup> *Supra* note 14; *Rome Statute* of the International Criminal Court, 17 July 1998, 2187 UNTS 3, 37 ILM 1002 (entered into force 1 July 2002) [*Rome Statute*]. The crime against humanity of enslavement is defined in 7(2)(c) as, “...the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”

<sup>19</sup> *Prosecutor v Alex Tamba Brima*, SCSL-2004-16-A, Appeals Judgment (22 February 2008) (Special Court for Sierra Leone) online: UNHCR <<http://www.unhcr.org/refworld/docid/48441e412.html>> [AFRC Case].

Forced Revolutionary Council (AFRC) case, found the practice to constitute the crime against humanity of sexual slavery.<sup>20</sup> The International Criminal Court has issued indictments in Uganda for similar practices as ‘sexual enslavement’. In the Democratic Republic of Congo, the ICC indictments include war crimes of sexual slavery and rape. In the Extraordinary Chambers in the Courts of Cambodia (ECCC), lawyers for civil parties requested in February 2009 that the Prosecutor conduct a supplementary investigation with the aim to amend the indictments in a case to include forced marriage.<sup>21</sup> More recently, the SCSL in the Revolutionary United Front (RUF) decision found commanders guilty of crimes against humanity including other inhumane acts of forced marriage.<sup>22</sup> In 2009, the guilty verdicts with regard to forced marriage in the RUF case against Sesay, Kallon and Gboa were confirmed.<sup>23</sup>

It is important to underline that international criminal law holds individuals responsible for crimes against humanity, genocide and war crimes. In the cases before the ICC, the SCSL, their predecessors, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY), the highest-ranking officials were indicted for such crimes. On the other hand, international customary law includes the prohibition on slavery and calls on states, not individuals, to be responsible for compliance and breaches. International human rights law is also a matter of state responsibility. Should states enact penal laws against slavery, individuals can be prosecuted under those provisions; this recently took place in Australia in the case of *The Queen v Tang*.<sup>24</sup>

While mass violations of human rights and slavery transcend these distinctions, the point is that international criminal law indicts individuals (often heads of rebel forces or authoritarian regimes), not governments, and is but one dimension of the international legal apparatus to consider when examining forced marriage in historical and comparative perspective.<sup>25</sup> Forced marriage as an isolated practice or as an institution in war implicates family law, human rights, international humanitarian law and slavery past

<sup>20</sup> *Prosecutor v Alex Tamba Brima*, SCSL-04-16-T, Judgment (20 June 2007) (Special Court for Sierra Leone) online: UNHCR <<http://www.unhcr.org/refworld/docid/467fba742.html>>.

<sup>21</sup> *Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Judgment (26 July 2010) (Extraordinary Chambers in the Courts of Cambodia), online: UNHCR <<http://www.unhcr.org/refworld/docid/4c56ccfb2.html>>.

<sup>22</sup> *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-T, Judgment (2 March 2009) (Special Court for Sierra Leone) online: UNHCR <<http://www.unhcr.org/refworld/docid/49b102762.html>> [RUF case].

<sup>23</sup> See the interesting documentary on the trial of Sesay, *War Don Don*, 2010, DVD: (Canada: Mongrel Media, 2010).

<sup>24</sup> *The Queen v Tang* [2008] HCA 39, 237 CLR 1.

<sup>25</sup> Allain, “*Koraou v Niger*”, *supra* note 16; Jean Allain, “The Definition of Slavery in International Law” (2008-2009) 52 *How LJ* 239 [Allain, “Definition of Slavery”].

and present. I turn now to the empirical context of forced marriage during the conflicts in Sierra Leone, Liberia, Uganda, Rwanda and DRC. In the section that follows, I will try to establish the reasons why the crimes described ought to be charged as enslavement and not as a separate crime of forced marriage – with a focus on the particular shared features across the conflicts.

### III. 'Forced Marriage' in the conflicts of Sierra Leone, Liberia, Uganda, Rwanda and DRC

There were massive violations of civilians' human rights that took place in each of the conflicts discussed in this article. However documentation is not always readily available – in particular in countries facing ongoing insecurity such as the DRC. The historical record is more accessible when governments have undertaken commissions for inquiry and reconciliation as in Sierra Leone and Liberia or where there have been criminal prosecutions as in Rwanda. During the ten-year conflict in Sierra Leone (1992-2002 approximately), egregious crimes against civilians took place. According to the final report of the Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*,<sup>26</sup> violations of adults and children included forced displacement, abduction, arbitrary detention, killing, destruction of property, assault/ beating, looting of goods, physical torture, forced labour, extortion, rape, sexual abuse, amputation, forced recruitment, sexual slavery, drugging, and forced cannibalism. The age and gender profile of victims varied according to the crime.

The Truth and Reconciliation Commission (TRC) in Sierra Leone found that:

...documented victims of forced recruitment, sexual slavery and rape were younger than the other violation types. Specifically, the following conclusions can be drawn:

- 50% of the victims of forced recruitment with age documented were 14 years of age or younger when they were forcibly recruited;
- 25% of rape victims with age documented were 13 years of age or younger;
- 50% of sexual slaves with age documented were children aged 15 or under when they were abducted.<sup>27</sup>

Women and girls were subjected to sexual and gender-based violence including kidnapping, rape, forced marriage, forced impregnations and

<sup>26</sup> Sierra Leone, Truth & Reconciliation Commission Report, *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission* (Sierra Leone: Truth & Reconciliation Commission, 2004), online: Sierra Leone Truth and Reconciliation Commission Report <<http://www.sierra-leone.org/TRCDocuments.html>>.

<sup>27</sup> *Ibid* at Appendix 1, Figure 4 A1 21.

childbearing.<sup>28</sup> The TRC found that “young girls most of them not yet at puberty were raped and taken away to become ‘bush wives’.”<sup>29</sup> All factions to the conflict were guilty of violations against girls and women. The language used in the TRC Report, however, connotes some differences between rebel groups. Women were used by the RUF, for example, “as sexual and domestic slaves” while the AFRC committed rape and sexual violence, using women as “sexual slaves” according to the Commission.<sup>30</sup>

“Women and girls were detained [by the Sierra Leone Army] under conditions of extreme cruelty with the deliberate intention of raping them and perpetrating other acts of sexual violence upon them”.<sup>31</sup> And the West Side Boys [a renegade soldier group] “abducted women and girls, holding them against their will, forcing them into marriage, raping them, using them as sexual slaves and perpetrating a range of brutal and inhuman acts upon them”.<sup>32</sup> It is not clear from the published report how those experiences differed or how survivors described the harms to the Commission investigators since their statements are not public. What is clear from the TRC report is that women were raped and forced into conjugal associations with rebels that included sexual violence, but were not limited to sexual violence. Indeed, many of the testimonies before the TRC as well as the SCSL use the term wife or marriage without further explanation. It is left for the reader to deduce that women were forced to cook, bear children, travel with the rebels, and support the combatant to whom she had been assigned or who had raped and captured her. In return, she may have received some measure of protection from the rebel.<sup>33</sup>

Liberia endured a prolonged conflict which included a number of the same violations that occurred in Sierra Leone, their neighbour to the north. However, the ICC has not indicted leaders such as Charles Taylor for crimes in Liberia nor has that country’s government established a Tribunal. Rather, Taylor stands trial for indictments from the SCSL for alleged crimes (murder, rape, mutilation) committed by his rebel forces and aiding Leonean rebel forces. Indeed, it is alleged that some of the most violent crimes occurring during the conflict in Sierra Leone were aided by or committed by Taylor’s

<sup>28</sup> Susan McKay & Dyan Mazurana, *Where are the Girls? Girls in the Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War* (Montréal: Rights & Democracy, 2003).

<sup>29</sup> *Supra* note 26 at vol 3A, para 127.

<sup>30</sup> *Ibid* at vol 2, paras 503, 505.

<sup>31</sup> *Ibid* at para 511.

<sup>32</sup> *Ibid* at para 512.

<sup>33</sup> *Ibid*. In one excerpt from a victim testimony before the TRC, for example, Marion Kargbo states that she was raped by seven AFRC/RUF men in 1999 and “the boss of the seven men took me as his wife ... unfortunately for me my jungle ‘husband’ was killed during the exchange of firing. The second in command straight away became my next husband under serious threat.”

forces. The government in Liberia did hold a Truth and Reconciliation Commission which published its report in 2009.

With respect to women and girls, the *Final Report of the Truth and Reconciliation Commission of Liberia* (2009) found that “[a]ll factions engaged in armed conflict, violated, degraded, abused and denigrated, committed sexual and gender based violence against women including rape, sexual slavery, forced marriages and other dehumanizing forms of violations.”<sup>34</sup> And with regard to forced marriage and sexual slavery:

Women were kidnapped and forced into sexual slavery only to be passed around as ‘wives’ of roaming combatants. They were also forced to engage in hard labour making them both sex and labour slaves relegating them to the status of chattel slaves. Women suffered the indignity of having the children that they bore after being raped and held as sex slaves summarily taken away from them by combatants at the end of armed conflict. Many women that testified before the TRC either through statement taking or the hearings gave thousands of heart breaking narratives about how they were brutalized during armed conflict.<sup>35</sup>

In addition to some shared characteristics of how girls and women were treated during the conflicts in Sierra Leone, Liberia and elsewhere, courts and commissions have observed that practices described as forced marriage were not only the acts of individual combatants and soldiers. The SCSL also heard testimony from women about their experiences of gender-based violence, included abduction, rape and forced marriage. The trial judgment in the RUF case found that “forced marriage was important to the RUF both as a *tactic of war and means of obtaining unpaid logistical support for troops* [emphasis added].”<sup>36</sup> This is an important dimension of the practice which, I would argue, is better captured in the social and legal category of enslavement rather than the crime against humanity of forced marriage. The former connotes an institutionalized process during conflict and is consistent with the historical practices of the use of slave labour during wars in pre-colonial and colonial Africa.

During the war in Uganda, the practice of forced marriage of girls and women most closely resembled what happened in Sierra Leone. Christopher Carlson and Dyan Mazurana interviewed 103 women and girls who were abducted by Lord’s Resistance Army (LRA) combatants.<sup>37</sup> Carlson and

<sup>34</sup> Liberia, Truth and Reconciliation Commission of Liberia, *Volume II: Consolidated Final Report* (Liberia: Truth and Reconciliation Commission of Liberia, 2009) at 17, online: Truth and Reconciliation Commission of Liberia <<http://trcofliberia.org/reports/final-report>>.

<sup>35</sup> Liberia, Truth and Reconciliation Commission of Liberia, *Volume I: Preliminary Findings and Determinations* (Liberia: Truth and Reconciliation Commission of Liberia, 2009) at 45, online: Truth and Reconciliation Commission of Liberia <<http://trcofliberia.org/reports/final-report>>.

<sup>36</sup> *Supra* note 22 at para 2107.

<sup>37</sup> Christopher Carlson & Dyan Mazurana, “Forced Marriage within the Lord’s Resistance Army, Uganda” *Feinstein International Centre* (May 2008), online: Feinstein International Centre <<http://www.sites.tufts.edu/feinstein/2008/forced-marriage-within-the-lra-uganda>>.

Mazurano “also interviewed parents and family members of abducted females; ex-LRA combatants; religious, clan, and community leaders; local government officials; Acholi and Langi clan leaders and people responsible for customary law; lawyers, and local, national, and international NGOs working in northern Uganda.”<sup>38</sup> Much like the finding of the Special Court for Sierra Leone, women’s labour through forced marriage in Uganda was a tactic of war:

Our evidence reveals that the crimes committed against these females were not haphazard, but were methodically organized by the senior leadership of the LRA. The presence of forced wives in the LRA served to bolster fighter morale and support the systems which perpetuate cycles of raiding, looting, killing, and abduction. The LRA leadership exercised rigid control over the sexuality of abducted women and girls through intimidation, discrimination, and violence. The LRA leader, Joseph Kony, is thought to have forcibly married more than 40 females and to have fathered dozens of children through rape and forced marriage. At any one time his commanders had on average five forced wives, while lower level fighters had one or to two.<sup>39</sup>

In both Sierra Leone and Uganda, women spoke of being referred to as a ‘wife’ despite the fact that in neither country would they be considered legally married, in customary or civil law. The Trial Chamber II of the Special Court in the AFRC case heard expert testimony in 2005 from Zainab Bangura (now a Minister in the Sierra Leone government) on the issue of forced marriage. The Prosecution commissioned her report about both the AFRC and RUF and in it “forced marriage was captioned as the ‘Bush Wife Phenomenon’”:<sup>40</sup>

According to Zainab Bangura, forced marriage arose when a young girl/ woman was abducted during the war, came under the total control and command of a rebel/ soldier (captor) claiming her to be his wife. This happened when the captor proclaimed *yu na mi wef*, in the Krio lingua franca meaning ‘you’re my wife’. At this point the victim was left with no option to accept the ‘marriage’... In return, the ‘bush husband’ ensured that he provided protection and support in terms of food and clothing.<sup>41</sup>

Other narratives of forced marriage during the war are consistent with Zainab Bangura’s general description. Reparations for human rights violations were recommended by the TRC in Sierra Leone and the National Commission for Social Action (NaCSA) proceeded to take claims.<sup>42</sup> Survivors of gender violence who have made reparations claims to the NaCSA, for example,

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<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> Ibrahim Jalloh, “Analyzing Bush Wife Phenomenon at the Special Court Trials” *Centre for Accountability and Rule of Law* (2 May 2006) at para 1, online: Centre for Accountability and Rule of Law <<http://www.carl-sl.org/home/articles/92-ibrahim-jalloh>>.

<sup>41</sup> *Ibid* at para 2.

<sup>42</sup> See Jamesina King, “Gender and Reparations in Sierra Leone: The Wounds of War Remain Open” in Ruth Rubio-Marin, ed, *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006) at 246.

describe forced marriage during the war as when they were raped, abducted and then the rebel said, “you are now my wife”.<sup>43</sup> One woman I interviewed in August 2010, ‘M’, gave an interview to the SCSL investigators but did not testify in court. She explained in her words that she spent five years in the bush as a ‘wife’. After the first combatant was killed, she was assigned to another.<sup>44</sup>

Of 321 women’s claims for reparation, which I sampled randomly, approximately one quarter of the claimants talked about the designation of ‘wife’ in her claim. Many spoke of rape and other losses during the conflict. In the required description of the event leading to the human rights abuse, as the reparation form titles it, women spoke of being “forced into marriage”, “taken as a wife”, or “used as their wife”.<sup>45</sup> The use of the term ‘bush wife’ or ‘forced marriage’ as in the decisions from the Special Court, however, is not without its critics.

For example, a judge of the Supreme Court of Sierra Leone commented that what happened to women in the prolonged war in the country was not “forced marriage – that is what happens in customary law marriages”, referring to marriage without the consent of the bride.<sup>46</sup> A woman’s rights activist objected to the use of the term marriage; the reason ‘forced marriage’ in the Sierra Leone conflict was not ‘marriage’ is that it was not arranged nor arranged by families, she explained.<sup>47</sup> The former Deputy Prosecutor for the SCSL, Joseph Kamara, also noted that the term ‘bush wife’ predates the years of the conflict in Sierra Leone. The bush wife phenomenon previously referred to when women were “taken” as a wife without the proper arrangements of the families.<sup>48</sup> These comments raise important questions that are not explored in the SCSL decisions. What are the similarities and differences between the rape and ‘marriage’ of women before and during the conflict in the Sierra Leone? How do women understand the differences? Is it important to distinguish forced marriage or bush wife practice from enslavement during war?

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<sup>43</sup> Rosaline M Carthy, “Forced Marriage in Conflict Situations – The Sierra Leone Experience” (Paper delivered at the Forced Marriage in Conflict Situations International Workshop, York University, 15 October 2010), [unpublished].

<sup>44</sup> Interview of ‘M’ (August 2010) in Freetown, Sierra Leone.

<sup>45</sup> Claims from National Commission for Social Action (NaSCA), (2011) on file with the author. A full analysis of the reparations claims and interviews is not the purpose of this article but is the focus of further research along with the women’s umbrella organization, Women’s Forum of Sierra Leone.

<sup>46</sup> Interview of Justice Thompson, Judge of Supreme Court of Sierra Leone (August 2010).

<sup>47</sup> Interview of women’s rights activist (August 2010).

<sup>48</sup> Interview of Josepha Kamara, former Deputy Prosecutor for the SCSL (August 2010).

During the Rwandan genocide, women were subjected to extreme sexual violence and gender crimes.<sup>49</sup> This was documented by Binaifer Nowrojee in her important Human Rights Watch report *Shattered Lives: Sexual Violence During the Rwanda Genocide and its Aftermath*.<sup>50</sup> Enslavement for forced marriage, however, is very little discussed with regard to gender violence during and after the Rwandan genocide. I have found only two references to forced marriage as a form of gender violence. In the introduction to the 1996 report, Nowrojee writes:

Other women managed to survive only to be told that they were being allowed to live so that they would “die of sadness.” Often women were subjected to sexual slavery and held collectively by a militia group or were singled out by one militia man, at checkpoints or other sites where people were being maimed or slaughtered, and held for personal sexual service. The militiamen would force women to submit sexually with threats that they would be killed if they refused. These forced “marriages,” as this form of sexual slavery is often called in Rwanda, lasted for anywhere from a few days to the duration of the genocide, and in some cases longer.<sup>51</sup>

Jennie Burnet similarly emphasizes sexual violence and includes forced marriage in the list of violations experienced by women:

A key feature of the 1994 genocide in Rwanda was sexual violence. Sexual violence (ranging from forced marriage to rape to sexual torture and mutilation) was used to torture, terrorize, or kill Tutsi women and girls; to humiliate Tutsi men who could not protect their wives or daughters; and to reward militiamen and male civilians who participated in the genocide.<sup>52</sup>

The practice of forced marriage as a form of sexual violence during the genocide was rarely spoken about, never prosecuted and remains all but undocumented in research on the genocide.

#### IV. Enslavement and Sexual Slavery

As I discussed above, the SCSL established the new crime against humanity of “other inhumane act (forced marriage)” in the AFRC Appeals

<sup>49</sup> Sandra Ka Hon Chu & Anne-Marie de Brouwer, eds, *The Men Who Killed Me: Rwandan Survivors of Sexual Violence* (Vancouver: Douglas & McIntyre, 2009).

<sup>50</sup> Binaifer Nowrojee, *Human Rights Watch, Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (New York: Human Rights Watch, 1996) [Nowrojee, *Human Rights Watch*]; Beth Van Schaack, “Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda” Legal Studies Research Papers Series, Working Paper No. 08-55, July 2008. See also Binaifer Nowrojee “‘Your Justice is Too Slow’: Will the ICTR Fail Rwanda’s Rape Victims?” (United Nations Research Institute for Social Development (UNRISD) Occasional Paper, Geneva, November 2005) [Nowrojee, “Your Justice”].

<sup>51</sup> Nowrojee, *Human Rights Watch*, *supra* note 51 at 2.

<sup>52</sup> Jennie E Burnet, “Sexual Violence and Ethnic/Racial Identity in the 1994 Rwandan Genocide” (Paper delivered at the Sexual Violence and Conflict in Africa Workshop, Carleton University, 5-6 May 2010), [unpublished].

Chamber decision to hold commanders responsible for the harms described as the “bush wife phenomenon”.<sup>53</sup> In that case, the legal precedent was set but convictions on this ground were not entered.<sup>54</sup> The RUF case, however, did find commanders guilty of this crime against humanity. In the RUF Appeals decision, the court laid out the elements according the SCSL statute:

With respect to forced marriage, the Appeals Chamber recalls that the offence “describes a situation in which the perpetrator[,] ... compels a person by force, threat of force, or coercion to serve as a conjugal partner.” The conduct must constitute an “other inhumane act,” which entails that the perpetrator: (i) inflict great suffering, or serious injury to body or to mental or physical health; (ii) sufficiently similar in gravity to the acts referred to in Article 2.a through Article 2.h of the Statute; and that (iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act. As a crime against humanity, the offence also requires that the acts of the accused formed part of a widespread or systematic attack against the civilian population, and that the accused knew that his crimes were so related.<sup>55</sup>

This definition of the new crime of forced conjugal association “substantially adds to the recorded history of gender-based violence by the AFRC within the conflict in Sierra Leone, thereby positively contributing to transitional justice in that country.”<sup>56</sup> This definition may also have substantial impact on other indictments from the ICC. The SCSL is now wrapping up its work in Freetown and has moved to the legacy stage of its mandate. The two most important precedents from the perspective of the offices of the Prosecutor and Registrar of the Special Court are its decisions on recruiting children into soldiering and forced marriage.<sup>57</sup>

The former Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practises During Armed Conflict, Gay J. McDougall, reported in 1998 that sexual slavery “also encompasses situations where women and girls are forced into ‘marriage’, domestic servitude or other forms of labor that ultimately involve forced sexual activity, including rape by their captors.”<sup>58</sup> Survivors of forced marriage in Sierra Leone and elsewhere, and their advocates may or may not agree with this characterization as ‘slavery’ or the distinctions drawn between sexual slavery and forced marriage. Indeed

<sup>53</sup> *Supra* note 19.

<sup>54</sup> Oosterveld, “Transitional Justice”, *supra* note 7; Valerie Oosterveld, “Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes” (2009) 17:2 Am U J Gender Soc Pol’y & L 407 [Oosterveld, “Lessons”].

<sup>55</sup> *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-A, Appeals Judgment (26 October 2009) (Special Court for Sierra Leone) online: UNHCR <<http://www.unhcr.org/refworld/docid/4ae9b31c2.htm>> at para 735 [RUF Appeal Decision].

<sup>56</sup> Oosterveld, “Transitional Justice”, *supra* note 7 at 88; see also Oosterveld “Lessons”, *supra* note 54.

<sup>57</sup> Interview of the Office of the Prosecutor, SCSL (28 August 2010); Interview of the Deputy Registrar of the Special Court, SCSL (27 August 2010).

<sup>58</sup> McDougall, *supra* note 5 at 9-10.

the language of sexual slavery is very provocative and powerful. Joel Quirk writes:

When critics charge that specific practices constitute 'slavery', or mark a continuation of 'slavery by another name', what they are usually suggesting is that they should be equated with the worst excesses of transatlantic slavery.

The key question here is not so much whether specific practices are identical to slavery, at least in part because slavery can be defined in a number of ways, but instead *whether they share sufficient features in common with slavery to be rendered illegitimate as a result of prior anti-slavery commitments.*<sup>59</sup>

In the context of forced marriage within the Lord's Resistance Army in Uganda, for example, Kristopher Carlson and Dyan Mazurana found that "[w]hat is often overlooked when forced wives are characterized as solely sexual slaves is a particular quality of injustice they have suffered – the forced imposition of the status of marriage."<sup>60</sup> A number of other scholars agree that sexual slavery does not capture this specific harm. Michael Scharf and Suzanne Mattler argue that "[s]exual slavery describes the loss of personal freedom and sexual violence, but does not speak to the forced domestic labor, childbearing, childrearing, and degradation of the institution of marriage."<sup>61</sup> Neha Jain also criticizes the Trial Chamber's decision in the AFRC case for "emphasizing the role of sexual abuse as an inherent component of the forced marriages in Sierra Leone and concluded that the elements constituting forced marriage in the context of Sierra Leone were completely subsumed within the crime of sexual slavery."<sup>62</sup> The Appeals Chamber of the SCSL in the AFRC case also found sexual slavery to be an inadequate categorization of forced marriage. Indeed the Appeals Chamber found, by contrast, that forced marriage "is not predominantly a sexual crime."<sup>63</sup> It found the facts of forced marriage to constitute a distinct crime within the category of "Other Inhumane Acts"<sup>64</sup> and focused on the harms of "forced conjugal association" or partnership and the "long-term social stigmatization".<sup>65</sup> Some commentators have applauded this development in international criminal law for recognizing that forced

<sup>59</sup> *Supra* note 17 at 532 (emphasis added).

<sup>60</sup> *Supra* note 37 at 15.

<sup>61</sup> Michael P Scharf & Suzanne Mattler, "Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity" (2005) 1:2 Case Research Paper Series in Legal Studies at 17.

<sup>62</sup> Jain, *supra* note 3 at 1018-19; see Oosterveld, "Lessons", *supra* note 54.

<sup>63</sup> AFRC Case, *supra* note 19 at para 195.

<sup>64</sup> *Ibid* at paras 197-203.

<sup>65</sup> *Ibid* at paras 197, 199.

marriage in war is more than sexual slavery<sup>66</sup> or “more than the sum of its constituent acts”.<sup>67</sup>

Amy Palmer concludes, in her analysis of the AFRC appeal decision, that forced marriage “should be prosecuted as a separate crime under international law in order to appropriately recognize its gravity, prevent future tragedies, properly recognize the suffering of the victims, and facilitate an examination of the traditional marital union within differing cultures across the world.”<sup>68</sup> Scharf and Mattler also argue that forced marriage is a “valid and viable category of crime against humanity”<sup>69</sup> and ought to be prosecuted as the “unique crime that it is.”<sup>70</sup> A similar argument could be used to support the view of forced marriage in conflict situations as “enslavement”, without reducing the practice to only sexual slavery.

Due to concerns about the misuse of the term ‘marriage’ in the context of war and conflict, some scholars criticize using forced marriage as an appropriate heading under which to prosecute these acts. Karine Belair, for one, argues that the term marriage should be avoided because the crime in Sierra Leone was “one of sexual slavery, poorly veiled by the euphemism ‘marriage.’”<sup>71</sup> For the most part, however, Palmer, Oosterveld and others have welcomed the recognition of forced marriage as a distinct crime in international law as a positive development in transitional justice.<sup>72</sup>

What is less discussed in the literature is an examination of forced marriage as the crime against humanity of enslavement or as contemporary slavery: how neither ‘sexual slavery’ nor ‘the inhumane act of forced marriage’ may fit the crime for forced marriage. In order to recognize the gravity of the crime, the practice of forced marriage in war may be considered enslavement according to the *Rome Statute*<sup>73</sup> and prosecuted as such. Jean Allain argues that servile marriage (where a woman or girl is purchased, transferred or

<sup>66</sup> Jain, *supra* note 3 at 1022; see Augustine S J Park, “‘Other Inhumane Acts’: Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone” (2006) 15:3 Soc & Leg Stud 315.

<sup>67</sup> Amy Palmer, “An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of ‘Forced Marriage’” (2009) 7:1 Northwestern Journal of International Human Rights 133 at 159.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Supra* note 61 at 2.

<sup>70</sup> *Ibid* at 24.

<sup>71</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” (2006) 15 Colum J Gender & L 551 at 557.

<sup>72</sup> Micaela Frulli, “Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a ‘New’ Crime Against Humanity” (2008) 6 Journal of International Criminal Justice 1033.

<sup>73</sup> *Rome Statute*, *supra* note 18, Article 7(2)(c).

inherited) meets the definition of enslavement as a crime against humanity.<sup>74</sup> It is important to note, however, that in order to meet the constituent elements of a crime against humanity, forced marriage / enslavement must be part of a systematic and widespread attack on the civilian population. This raises important questions about the legal threshold to be met to prove enslavement in non-conflict situations. Like Allain, I would argue that this threshold would rarely be met in contexts outside war. And again, servile marriage does not include all non-consensual marriage.

The *Rome Statute*, establishing the International Criminal Court and its *Elements of Crimes*, expands the 1926 definition of slavery - "any or all of the powers attaching to the right of ownership" over a person - with the additional phrase "or similar deprivation of liberty".<sup>75</sup> Enslavement in the *Rome Statute* explicitly signals analogous situations. Thus, there is good reason to argue that the practice described variously as the "bush wife phenomenon" or "forced marriage" in Uganda or Sierra Leone would meet the definition of enslavement. Any effort to designate contemporary practices as forms of slavery remains open to charges of analytical overreach and rhetorical excess.<sup>76</sup> Even if we accept that some practices can be legitimately be described as a form of slavery or enslavement, it does not necessarily follow that the relevant thresholds can be easily applied to specific cases of forced marriage in either wartime or peacetime. Some observers will be very concerned that prosecuting practices referred to as 'forced marriage' in conflict situations such as slavery will lead to higher thresholds for proving forced marriage in non-conflict situations. I would argue that the context and conditions of war are substantively different from times of relative peace and, therefore, forced marriage in non-conflict zones would not necessarily meet the definition of slavery nor be required to. The relevant definition of servile marriage comes from the Supplementary Convention of 1956 and not all forms of marriage without consent are servile marriage.<sup>77</sup>

But what does an examination of the specific forms of servile marriage (purchased, transferred, inherited spouse) tell us about forced marriage in war? How does it push our analysis of gender crimes in conflict situations? I would argue, as Belair, that to prosecute forced marriage as a separate crime

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<sup>74</sup> Jean Allain, "Servile Marriage as Slavery and its Relevance to Contemporary International Law" (2010) [unpublished].

<sup>75</sup> *Rome Statute*, *supra* note 18 at art 7(1)(c); See also Proceedings of the Assembly of State Parties, 1st Sess, ICC-ASP/1/3 (2003) Article 8(2)(b)(xxii)-2: "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>76</sup> Benedetta Rossi, "Introduction: Rethinking Slavery in West Africa" in Benedetta Rossi, ed *Reconfiguring Slavery: West African Trajectories* (Liverpool: Liverpool University Press, 2009).

<sup>77</sup> *Supra* note 15, at arts 1, 7.

risks reinforcing a very gendered version of the crimes experienced by women and men. Nowhere have I seen mention of indictments citing the crime of being forced to marry – men are not seen as ‘victims’ of forced marriage and this form of sexual violence. While charging this crime as sexual slavery reduces the harms to the sexual, charging as forced marriage may reduce the harms to the conjugal. Enslavement by contrast can include both and casts our attention to human exploitation, bondage, control and violence.

On the other hand, while to be referred to as a forced wife is a gendering process, being called a [sex] slave is even more complicated. The definition of slavery is one predicated on ownership, control and transfer of people as chattel. Historians of slavery have argued that being treated as property or controlled as if owned by another person does not mean that she does not have agency. Indeed, there were slave rebellions and survival techniques. The process of being enslaved does not negate human agency nor destroy all subjectivity – it is the treatment of another person as if they are not human, as chattel to be bought and sold, transferred or inherited.

There is nothing new about women’s bodies and labour being used in war; there is nothing new about sexual violence in war. But what is distinctive about the attachment of the status of *wife* in conflict situations? Since women were assigned to a combatant and transferred from one to another by order of a commander, I would argue the practice meets the definition of both deprivation of liberty and powers attaching to ownership. Does this have an historical antecedent in concubinage or other slave practices?<sup>78</sup> As Paul Lovejoy argues:

[A]ll enslaved women and all enslaved children in the Trans-Atlantic Slave Trade can be considered to have been civilian casualties... The designation of ‘civilian casualties’ is not intended to trivialize the experiences of slavery, but to suggest that a comparison with modern forms of collateral damage to civilian populations should be perceived in historical perspective.<sup>79</sup>

## V. Further Research Questions

The particular cases of sexual and gender-based violence in each of the five conflicts discussed here need to be analyzed together from the perspective of forced marriage/enslavement of women during war. While Sierra Leone and Uganda seem to have some commonalities, and narratives from survivors confirm the use of the term ‘bush wife’ and its associated harms in both cases, there may be important differences. Further, given the distinct cultural and

<sup>78</sup> See Paul E Lovejoy, *Transformations in Slavery: History of Slavery in Africa*, 2d ed (Cambridge: Cambridge University Press, 2000).

<sup>79</sup> Lovejoy, “Internal Markets”, *supra* note 3 at 34.

political histories in each country, further empirical research is needed in order to understand how and why women were victimized during these conflicts.<sup>80</sup> Legal prosecution tends to flatten these empirical distinctions. I am also aware of the dangers of focusing once again on sexual violence.

Maria Eriksson Baaz and Maria Stern, in *The Complexity of Violence: A critical analysis of sexual violence in the Democratic Republic of the Congo*, also critically assess the focus on rape in the DRC in order to identify causal factors for this violence.<sup>81</sup> They write:

The most prevalent storyline of violence in the reporting on the warscape of the Democratic Republic of Congo (DRC) has been rape. Indeed, the DRC has become infamous globally through the reports on the massive scale of sexual violence. While other forms of violence and abuse have also been committed on a massive scale, it is sexual violence that has attracted the lion's share of attention, especially among 'outside' observers.<sup>82</sup>

Further, sexual violence in the DRC is most often understood to be violence against women perpetrated by men. Johnson et al. conducted extensive surveys in 2010 in over 1000 households in eastern DRC:

Rates of reported sexual violence were 39.7% among women and 23.6% among men. Women reported to have perpetrated conflict-related sexual violence in 41.1% of female cases and 10.0% of male cases. Sixty-seven percent of households reported incidents of conflict-related human rights abuses.<sup>83</sup>

The authors conclude that "many women *and men* in the area of Eastern DRC included in this study are survivors *and perpetrators* of sexual violence and other human rights violations."<sup>84</sup> This important study underscores the need to challenge the preoccupation with gendered victimhood; while the majority of victims are female, they are not only female. And while an astonishing number of women are subject to human rights abuses, they are not only victims – they are sometimes perpetrators and active agents. In my own work, one "ghost" haunting the discussion of forced marriage is the perpetrator/"bush husband". There is very little discussion, if any, in the literature about combatants who were forced to "take a wife" as part of an assault on a civilian population. How does thinking about male combatants as

<sup>80</sup> SSHRC Partnership Development Grant 2011-2014 (Bunting).

<sup>81</sup> Maria Eriksson Baaz & Maria Stern, "The Complexity of Violence: A critical analysis of sexual violence in the Democratic Republic of Congo (DRC)" (2010) (Sita Working Paper on Gender based Violence, Swedish International Development Cooperation Agency).

<sup>82</sup> *Ibid* at 7.

<sup>83</sup> Kirstin Johnson et al, "Association of Sexual Violence and Human Rights Violations With Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo" (2010) 304:5 *Journal of the American Medical Association* 553 at 553.

<sup>84</sup> *Ibid*, at 561; See also Gaelle Breton-Le Goff, "Crimes of Forced Marriage / Slavery in the Democratic Republic of Congo" (Paper delivered at the Forced Marriage in Conflict Situations International Workshop, 15 October 2010), [unpublished].

survivors/victims (much like child soldiers who committed atrocious crimes) change the gendered analysis of forced marriage?

Chris Dolan, in his book *Social Torture: The Case of Northern Uganda, 1986-2006*, has written about masculinity and gender violence in northern Uganda, and argues that, “paradoxical though it may seem, the closer a man comes to achieving the [hegemonic male] model, the greater his vulnerability to male sexual violence at the hands of other men.”<sup>85</sup> Xabier Agirre Aranburu also cautions against a “reductionist focus on female victims” and notes that there was an “extensive pattern of sexual abuse of male soldiers” found in Liberia.<sup>86</sup> Men are extremely reluctant to speak of this violence. Dolan’s work raises important and related future research questions. I would argue that empirical research needs to include interviews with former ‘bush husbands’ as well as commanders wherever possible. Further, research ought not be limited to sexual violence. Economic, social and other violence are connected to gender harms. As Baaz and Stern write, sexual and gender based violence “can neither be understood nor effectively countered if approached and studied in relative isolation. It has to be seen in a context where grave human rights violations occur daily.”<sup>87</sup>

In the conflict in the Democratic Republic of Congo and the genocide in Rwanda, there is a hyper-visibility of sexual violence against women. Rarely were gender crimes described as forced marriage.<sup>88</sup> Burnet writes:

[A]n unknown number of Rwandan girls/women were pressed into sexual relationships with RPF soldiers after they reached the safety of internally displaced persons camps within RPF held territory... Focusing solely on sexual violence committed by Hutu perpetrators against Tutsi victims obscures the full complexity and contradictions of sexual violence in the context of genocide.<sup>89</sup>

By contrast, investigators, activists and the media often discussed forced marriage or the ‘bush wife phenomenon’ in the conflicts of Liberia, Sierra Leone and Uganda. As history reminds us, the patterns of gender violence and types of human rights violations in conflict situations can vary significantly.<sup>90</sup>

Does ‘bush wife’ even mean the same thing in Sierra Leone as it does in Uganda? What about ‘wife’ and ‘marriage’ during the Rwanda genocide and violence in the DRC? There are important historical records from truth and reconciliation commissions in Liberia and Sierra Leone, as well as

<sup>85</sup> Chris Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006* (New York: Berghahn Books, 2009) at 211.

<sup>86</sup> Xabier Agirre Aranburu, “Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases” (2010) 35:4 *Law and Soc Inquiry* 855 at 862.

<sup>87</sup> *Supra* note 81 at 56.

<sup>88</sup> Breton-Le Goff, *supra* note 84.

<sup>89</sup> *Supra* note 52.

<sup>90</sup> Aranburu, *supra* note 86 at 859.

witness statements made to investigators in Rwanda, DRC, Uganda and Sierra Leone. These have not been systematically analyzed looking at forced marriage/enslavement. The full record of witness statements pertaining to forced marriage is not yet available to researchers, but it is clear there will be a rich archive of information pertaining to sexual violence and gender-based crimes when this material is available. Finally, non-governmental organizations working with survivors in each of these countries have a wealth of knowledge about experiences captured by the term ‘forced marriage’, but this information is often hard to find. I hope to better include this knowledge through the research collaboration and partnership with the Women’s Forum of Sierra Leone, AVEGA in Rwanda, Clinique Juridique de Goma, DRC, Coalition for Women’s Human Rights in Conflict Situations, and Feinstein International Center’s work in northern Uganda. It is imperative to document contemporary experiences more precisely and to compare these cases with historical practices also referred to as forced marriage. Thus, ours is a research project which brings together historians of slavery and women’s human rights scholars to contribute to the growing literature on gender crimes in international criminal law as well as the current debates on servile marriage, gender and slavery – by putting these debates in conversation with one another. I see this type of research as engaged in what Sally Engle Merry calls a “deterritorialized ethnography”, “an ethnographic engagement with the fragments of a larger system that recognizes that the system is neither coherent nor fully graspable”.<sup>91</sup> In exploring how the international criminal justice system frames experiences under the heading of ‘forced marriage’ or ‘slavery’ in different sites and the corresponding question of how victims and survivors understand these events, I seek to contribute to the “ethnographic study of global reform movements”.<sup>92</sup> Not only will research be concerned with capturing the flow of international justice ideas around ‘forced marriage’,<sup>93</sup> but it will also develop tools for research and advocacy.

## VI. Conclusions

Two hundred years after the British abolished their slave trade (1807), it is now the language of “humanitarianism” that embodies the international discourses around human entitlements to life... This new internationalized form of governance is subtler than earlier colonial forms yet represents a more tragic set of realities. International institutions work through the law to craft “victims” and “perpetrators” (or, indeed

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<sup>91</sup> Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006) at 29.

<sup>92</sup> *Ibid* at 28.

<sup>93</sup> *Ibid* at 29.

“victim-perpetrators”) within the parameters of legal science ... to perform them, yielding new subjects through which humanitarianism is further legitimized.<sup>94</sup>

In a recent case from Niger that was heard by the Community Court of Justice of the Economic Community of West African States (ECOWAS), Niger was found responsible for failing to protect one of its citizens from slavery.<sup>95</sup> Hadijatou Mani Karoua was sold at the age of twelve to a tribal chief according to a local customary practice called ‘Wahiya’. When she tried to flee almost ten years later, her ‘master’ claimed that she was his ‘wife’. Referring to international conventions, the absolute prohibition on slavery, and the practice of international criminal tribunals, the Court found that there can be “no doubt that the applicant was held in slavery for 9 years in violation of the legal prohibition of this practice.”<sup>96</sup> This is a rare case before a regional international court that is a historic finding of slavery.<sup>97</sup> Here too we have a case of overlapping considerations of customary family law, slavery and international criminal law that raises many of the broad questions we are asking in our research project.

Belair discusses how the investigation of sexual slavery and the experiences of abducted and raped women and girls during the conflict had a crucial impact on customary marriage debates in Sierra Leone. Indeed, she argues that the Truth and Reconciliation Commission’s findings on sexual slavery affected its call for better compliance with Sierra Leone’s obligations under the Women’s Convention, CEDAW.<sup>98</sup> The government of Sierra Leone has recently amended its law on the validity of customary marriage to require that both spouses be eighteen years of age and consent to the marriage. Interestingly, when I attended an outreach event in Port Loko with the SCSL staff in August 2010, the most animated moment in the meeting occurred when Patrick Fatoma discussed the new marriage act and said, “if you marry a woman without her consent, you cannot marry another woman.” Men, in particular chiefs and elders, reacted by shaking their heads, laughing and were visibly uncomfortable with this proposition.<sup>99</sup> Thus, we can see the potential for developments in transitional justice and international criminal law to directly impact domestic socio-legal reform and discussions about gender and marriage.

<sup>94</sup> Clarke, *supra* note 10 at 110.

<sup>95</sup> *Hadijatou Mani Koraou v The Republic of Niger*, ECW/CCJ/JUD/06/08 Judgment (27 October 2008) (Economic Community of West African States: Community Court of Justice) online: UNHCR <<http://www.unhcr.org/refworld/docid/496b41fa2.html>>.

<sup>96</sup> *Ibid* at para 80.

<sup>97</sup> See Allain, “*Koraou v Niger*”, *supra* note 16.

<sup>98</sup> *Supra* note 71.

<sup>99</sup> Outreach event in Port Loko with the SCSL staff (28 August 2010).