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## Forced Marriage at the Cambodian Crossroads: ECCC Can Develop a New Crime Against Humanity

I was forced to become that man's wife. And that man took me away for me to live with him, but I didn't want to. I was scared. He could take me wherever he wanted . . . My body was affected. My God, I was very ashamed. Now I have become useless. That is something that I do not believe anyone could be subjected to in life, that is to totally destroy someone's body. You become totally useless. You no longer have any value. When somebody sees you, they do not value you any longer, and they look down on you.<sup>1</sup>

They said I had to get married again and I said I didn't want to. They said they would kill me if I didn't agree. For five days I tried to deny them[,] but I had to agree because they threatened me. In 1979 *Angkar's* policies were very strict, there were no exceptions. There were 50–60 people at the ceremony . . . Couples were called to speak in front of everyone to say they would stay married. After the ceremony[,] some people committed suicide because they were upset and disappointed[,] but I struggled and I thought I would fight against it. I didn't know him before the ceremony; he was from a different village. I took a seat and he was in front of me. I had to stay with him otherwise both of us would be beaten or killed.<sup>2</sup>

### I. INTRODUCTION

Forced marriage is a unique crime with distinctive results. For both male and female victims, their lives after being forced into an unwanted marriage will never be the same. In addition to the initial suffering, forced marriage “compels two people to spend the rest of their lives with a spouse whom they did not choose and who may serve as a constant reminder of what they suffered.”<sup>3</sup>

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1. Prosecutor v. Katanga, ICC-01/04-01/07-T-140-Red-ENG, Trial Hearing, pp. 17–18 (May 12, 2010); Prosecutor v. Katanga, ICC-01/04-01/07-T-141-Red-ENG, Trial Hearing, p. 39 lines 3–8 (May 14, 2010).

2. 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, 551 (2010) (quoting Interview with April 17 Woman, in Cambodia (July 6, 2006)).

3. *Id.* at 556.

Forced marriage is one of the newest crimes to be tried as a crime against humanity, despite having several instances of the crime occurring without prosecution. In the past decade, international law has made significant strides in the criminalization and prosecution of forced marriage as a crime against humanity. However, progress has not moved fast enough, and will likely not gain significant traction as a crime against humanity without clarification of what elements constitute the crime, why it is unique, and how it can be prosecuted. This paper will discuss the history, current state, shortfalls, struggles, and future of forced marriage as a crime against humanity.

Part II of this paper will discuss the international treaties prohibiting forced marriage. Part III will analyze the history and the development, treatment, and legal analysis of forced marriage in international tribunals. Part III will also trace the crime of forced marriage from the first mention a mere fifteen years ago through the most recent trials. Part IV will discuss the unique characteristics of the crime, as perpetrated in the Khmer Rouge regime. Part V will then suggest five ways the tribunal in Cambodia can use the unique characteristics of the crime to make progress in understanding the crime. Part VI will briefly discuss the difference between forced marriage and arranged marriage.

## II. GOVERNING LAW

Treaties, agreements, and customary law have long protected family rights. For over 140 years, there has been international law designed to protect the rights of families, but the history of enforcement of these laws is limited.

The Declaration of Brussels in 1874 stated that “[f]amily honour and rights . . . *must* be respected.”<sup>4</sup> Six years later, this statement was adopted in the language of the Oxford Manual, one of the first treatises to compile the principles of international law relating to armed conflict.<sup>5</sup> Shortly thereafter, the Hague Conventions of 1899 and 1907 reiterated the principle, repeating that “[f]amily honour

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4. Project of an International Declaration Concerning the Laws and Customs of War, Art. 38 (Aug. 27, 1874), <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=71F5F42E64ABDF9DC12563CD00515682> (emphasis added).

5. The Laws of War on Land, Art. 49 (Sept. 9, 1880), <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/140?OpenDocument> (Adopted by the Institute of International Law at Oxford).

and rights, the lives of persons, as well as religious convictions and practice, must be respected.”<sup>6</sup> Four decades after these conventions, the landmark Universal Declaration of Human Rights, adopted by the United Nations General Assembly on December 10, 1948, gave the clearest prohibition of forced marriage. It explicitly states in Article 16:

“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>7</sup>

In December 1979,<sup>8</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was passed by the General Assembly and provides explicitly in Article 16(1)(b) that men and women must equally have “[t]he same right freely to choose a spouse and to enter into marriage only with their free and full consent[.]”<sup>9</sup> This treaty has been signed by 188 countries.<sup>10</sup> Similar provisions were passed in Article 23 of the International Covenant for Civil and Political Rights<sup>11</sup> and Article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage.<sup>12</sup>

The Rome Statute of the International Criminal Court (the Rome Statute) lists crimes that can be prosecuted by the

6. Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Art. 46, July 29, 1899, 32 Stat. 1803; Hague Convention IV - Laws and Customs of War on Land, Art. 46, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461; *see also* Project of an International Declaration, *supra* note 4.

7. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 16, U.N. Doc. A/810, at 4 (Dec. 10, 1948).

8. The Khmer Rouge is protected against international law created after 1979 by the principle of non-retroactivity. However, for the current and future instances of forced marriage as a crime against humanity, these treaties provide additional legal support in condemning the actions.

9. Convention on the Elimination of All Forms of Discrimination Against Women art. 16, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980).

10. *See* Chapter IV. Human Rights, 8. Convention on the Elimination of All Forms of Discrimination Against Women, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).

11. International Covenant on Civil and Political Rights, art. 23, Dec. 16, 1966, 999 U.N.T.S. 171, S. EXEC. DOC. E, 95-2 (1978); S. TREATY DOC. 95-20, 6 I.L.M. 368 (1967).

12. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, art. 1, Dec. 10, 1962, 521 U.N.T.S. 231.

International Criminal Court. Forced marriage, while not listed, meets the thresholds of several of the listed crimes within the various categories. The principle of non-retroactivity would prohibit the application of the Rome Statute to the Khmer Rouge trials.<sup>13</sup> However, due to the similarity of the Rome Statute to the establishing documents of many international war tribunals and as a general framework for the prosecution of the forced marriage in future trials, the Rome Statute provides a useful guideline for how forced marriage can be treated.

While forced marriage has been either explicitly or implicitly banned by all of these agreements and treaties, it has an extremely limited history of prosecution in international courts.<sup>14</sup> Additionally, forced marriage could be prosecuted under genocide,<sup>15</sup> war crimes,<sup>16</sup> or a violation of international customary law;<sup>17</sup> however, the crime will be discussed as a crime against humanity, as described by Article 7 the Rome Statute.

Additionally, it is worth noting that many countries also have domestic protections for forced marriage. Most of these protections are not focused on governments forcing marriage, but are primarily aimed at protecting individuals from their families or communities forcing them to marry.<sup>18</sup> For example, Australia has a history of voiding marriages entered into by force, under the premise that the

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13. Rome Statute of the International Criminal Court, art. 24, July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002 (1998) [hereinafter Rome Statute].

14. For a detailed description on how international law has treated, or failed to treat crimes of a sexual nature, see KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN (1997) [hereinafter ASKIN, WAR CRIMES AGAINST WOMEN].

15. In *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶¶ 731–34 (Sept. 2, 1998), the International Criminal Tribunal for Rwanda showed how rape, a form of sexual violence, could meet the elements of genocide under some circumstances. Likewise, forced marriage could be a tool of genocide. For example, if a policy forced members of one ethnic group to marry outside of the group, it could meet the requirements of Rome Statute Article 6(c), inflicting conditions of life calculated to bring about its physical destruction.

16. Forced marriage could meet the standards of Rome Statute Article 8(2)(a)(iii) (willfully causing great suffering); 8(2)(b)(xxi) (outrages upon personal dignity); 8(2)(b)(xxii) (any other form of sexual violence constituting a breach of the Geneva Conventions); 8(2)(c)(ii) (outrages upon personal dignity); 8(2)(e)(vi) (any other form of sexual violence constituting a serious violation of article 3 common to the four Geneva Conventions).

17. For example, many scholars argue that the UDHR has achieved the status of customary law. See Digital Record of the UDHR (Feb. 2009), <http://www.ohchr.org/EN/NEWSEVENTS/Pages/DigitalrecordoftheUDHR.aspx>.

18. See U.N. Secretary-General, *Forced Marriage of the Girl Child*, ¶¶ 18–54, U.N. Doc. E/CN.6/2008/4 (Dec. 5, 2007).

marriage was entered into under duress,<sup>19</sup> while the United Kingdom maintains an office to protect against forced marriages.<sup>20</sup>

### III. HISTORY OF INTERNATIONAL TRIBUNALS AND FORCED MARRIAGE

#### *A. International Criminal Tribunal for the Former Yugoslavia*

The first mention that forced marriage could be a crime against humanity came in 2001 during the International Criminal Tribunal for the former Yugoslavia (ICTY). The *Prosecutor v. Kvočka* Trial Chamber mentioned that “[s]exual violence 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.”<sup>21</sup> However, the ICTY did not address the elements of the crime, but only suggested that the crime was similar to those already listed in the Rome Statute Art. 7(1)(g), Art. 8(2)(b)(xxii), and Art. 8(2)(e)(vi).<sup>22</sup> The ICTY was the first to make a mention of forced marriage as a crime against humanity, but it was not until subsequent tribunals that the crime would actually be discussed.

#### *B. International Criminal Tribunal for Rwanda*

During the Hutu/Tutsi conflict in the mid-1990s, commonly referred to as the Rwandan Genocide, sexual violence occurred to hundreds of thousands of victims.<sup>23</sup> In this conflict, there are many

19. See e.g., *Department of Human Services v. Brouker*, (2010) 44 Fam. LR 486 (Austl.).

20. See generally FOREIGN & COMMONWEALTH OFFICE AND HOME OFFICE, *Forced Marriage* (8 June, 2015), <https://www.gov.uk/guidance/forced-marriage>. In some countries, the government will apply a marriage title such as “common law marriage” if a couple has lived together in a marriage-like relationship for a certain period of time. Technically, the government in these situations is forcing the title of marriage on the couple. However, this can be distinguished from forced marriage as a crime against humanity because the governments are recognizing a relationship the couple voluntarily entered. Additionally, this is generally applied to expand benefits, such as spouse survivor benefits, to the parties. See Common-Law Marriage, BOUVIER LAW DICTIONARY.

21. *Prosecutor v. Kvočka*, Case No. ICTY IT-98-30/1-T, Judgement, 49 n.343 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

22. Rome Statute, *supra* note 13, at arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

23. Special Rapporteur of the Commission on Human Rights, Report on the Situation of Human Rights in Rwanda, ¶ 16 Resolution S-3/1, U.N. Doc. E/CN.4/1996/68 (May 25, 1994) (estimating rape occurred between 250,000 and 500,000 times throughout the conflict).

accounts that forced marriages occurred,<sup>24</sup> but the exact number remains unknown.<sup>25</sup> The forced marriages took place as both *de facto* marriages, where the victims were essentially kidnapped and given the title “wife” by a soldier, and marriages where sham ceremonies between soldier and victim were officiated by a military leader.<sup>26</sup> Despite the ICTY stating that forced marriage could be a crime against humanity only a few years earlier, and the prosecutor knowing the crime happened on a widespread scale,<sup>27</sup> it was never prosecuted in the International Criminal Tribunal for Rwanda.<sup>28</sup>

### C. *Special Court for Sierra Leone*

A few years later, the Special Court for Sierra Leone (SCSL) addressed forced marriage in three cases between 2008 and 2009.<sup>29</sup> In Sierra Leone, forced marriages generally consisted of individual rebel soldiers abducting women by force to be their “wife” or “bush wife.”<sup>30</sup> This “wife” was then expected to acquiesce to the sexual desires of her “husband,” as well as cook, clean, carry his loads, and raise his children.<sup>31</sup> These “marriages” did not include any marriage ceremony or formal registration, but rather resulted in *de facto* marriage status.<sup>32</sup> The man would claim sexual exclusivity over the woman and force her to maintain other conjugal duties. One result of these forced marriages was the lasting effect of the “wife” label on the victims. A woman often “bore the stigma of a ‘bush wife’ even after she was discarded by the rebel.”<sup>33</sup> Many times these forced

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24. BINAIFER NOWROJEE, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH 56–62 (1996).

25. *Id.* at 1.

26. Monika Satya Kalra, *Forced Marriage: Rwanda’s Secret Revealed*, 7 U.C. DAVIS J. INT’L L. & POL’Y 197, 201 (2001).

27. *See id.*; *see also* NOWROJEE *supra* note 24, at 59–62.

28. Neha Jain, *Forced Marriage as a Crime Against Humanity*, 6 J. INT’L CRIM. JUST. 1013, 1026 (2008) [hereinafter Jain]. Admittedly, prosecutors, especially in international tribunals, have limited resources. The International Criminal Tribunal for Rwanda had limited resources yet made several important steps forward in the international law arena.

29. Prosecutor v. Brima (*AFRC Trial Judgement*), Case No. SCSL-04-16-T, Judgement, ¶ 713 (June 20, 2007); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgement (Mar. 2, 2009); and Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement (Sept. 26, 2013).

30. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement, ¶ 1019 (Sept. 26, 2013).

31. Valerie Oosterveld, *The Special Court for Sierra Leone, Child Soldiers, and Forced Marriage: Providing Clarity or Confusion?*, 45 CAN. Y.B. INT’L L. 131, 158 (2007).

32. Jain, *supra* note 28, at 1026.

33. *Id.*

marriages endured after the conflict was over due to societal stigma toward the woman, the woman's inability to support the children resulting from the relationship, societal pressures to remain married, and other reasons.<sup>34</sup> Forced marriage was discussed in three trials during the SCSL tribunals, with varying, contradictory interpretations of the crime.

### *1. AFRC Trial*

The Trial Chamber of the *Prosecutor v. Brima* (Armed Forces Revolutionary Council, or *AFRC*) trial ruled that forced marriage “is completely subsumed by the crime of sexual slavery and that there is no lacuna in the law which would necessitate a separate crime[.]”<sup>35</sup> However, in the eyes of the partially dissenting Justice Doherty, “the crucial element of ‘forced marriage’ is the imposition, by threat or physical force arising from the perpetrator’s words or other conduct, of a forced conjugal association by the perpetrator over the victim.”<sup>36</sup> Essentially, the majority opinion ruled that forced marriage was “predominantly sexual in nature,”<sup>37</sup> while the dissenting opinion stressed the unique psychological suffering caused by the use of the label “wife.”<sup>38</sup> This label could lead to stigmatization and rejection of the victims by their families and communities,<sup>39</sup> which often led to “prolonged mental suffering by negatively impacting the ability of the victim to re-integrate into the community.”<sup>40</sup>

The *AFRC* Appeals Chamber did not agree with the Trial Chamber judgment. Rather, it found that forced marriage is a crime against humanity that fits under the heading of “other inhumane acts.”<sup>41</sup> Despite there being significant overlap between forced marriage and sexual slavery, the Appeals Chamber highlighted two distinctions which “imply that forced marriage is not predominantly

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34. *Id.*

35. *AFRC Trial Judgement*, ¶ 713.

36. *Id.* ¶¶ 52–53 (Partially Dissenting Opinion of Justice Doherty).

37. *Prosecutor v. Brima (AFRC Appeals Judgment)*, Case No. SCSL-2004-16-A, Judgment, ¶ 188 (Feb. 22, 2008) (characterizing majority rationale in *AFRC Trial Judgment*).

38. *AFRC Trial Judgement*, ¶ 52 (Partially Dissenting Opinion of Justice Doherty).

39. For examples of the long-term effects on the women, see NOWROJEE, *supra* note 24, at 59–62.

40. Jain, *supra* note 28, at 1019.

41. *AFRC Appeals Judgment*, ¶¶ 197–203.



a sexual crime.”<sup>42</sup> First, in addition to sexual relations, there was “forced conjugal association . . . [that resulted] in great suffering, or serious physical or mental injury on the part of the victim.”<sup>43</sup> The Appeals Chamber continued: “forced marriage implies a relationship of exclusivity between the ‘husband’ and ‘wife,’ which could lead to disciplinary consequences for breach of this exclusive arrangement.”<sup>44</sup>

The Appeals Chamber’s historical ruling resulted in the first definition of forced marriage:

[F]orced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.<sup>45</sup>

Additionally, the Appeals Chamber required that the *chapeau* element of all crimes against humanity must be met.<sup>46</sup> This essentially meant that the crime must be both on a widespread level and of sufficient gravity to constitute a crime against humanity.

## 2. RUF Trial

The *Prosecutor v. Sesay, Kallon & Gbao* (Revolutionary United Front, or RUF) trial discussed forced marriage under several categories: other inhumane acts,<sup>47</sup> part of a terrorism strategy,<sup>48</sup> outrages upon personal dignity,<sup>49</sup> collective punishment,<sup>50</sup> sexual violence,<sup>51</sup> and in conjunction with sexual slavery.<sup>52</sup>

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42. *Id.* ¶ 195.

43. *Id.*

44. *Id.*

45. *Id.* ¶ 196.

46. *Id.* ¶ 198.

47. *Prosecutor v. Sesay (RUF Judgement)*, Case No. SCSL-04-15-T, Judgement, ¶¶ 164–72 (Mar. 2, 2009).

48. *Id.* ¶¶ 1351–52, 1356, 1493, 1602.

49. *Id.* ¶ 1583.

50. *Id.* ¶ 1495.

51. *Id.* ¶ 1574.

52. *See, e.g., id.* §§ 5.1.2.6, 5.1.4.4, 5.2.2.2, 6.2.2.1, 8.2.2.2.

While the Trial Chamber did not “consider the definition of forced marriage per se,”<sup>53</sup> it made some interesting contributions on the issue. The judgment noted that because the rebels’ actions of capturing the women and taking them as wives “satisfie[d] the *actus reus* of ‘forced marriage,’ namely the imposition of a forced conjugal association.”<sup>54</sup> The Chamber also noted that “the conjugal association forced upon the victims carried with it a lasting social stigma which hampers their recovery and reintegration into society.”<sup>55</sup> The Chamber once again reiterated the importance of domestic labors and stated that “‘bush wives’ were not only forced into exclusive conjugal sexual relationships but were also expected to perform domestic chores and to bear children.”<sup>56</sup> However, the Chamber did not overlook the long-term effects of the crime on the victims:

[Victims of] sexual slavery and “forced marriage” endured particularly prolonged physical and mental suffering as they were subjected to continued sexual acts while living with their captors under difficult and coercive circumstances. Due to the social stigma attached to them by virtue of their former status as “bush wives” and the effects of the prolonged forced conjugal relationships to which they were subjected, these women and girls were too ashamed or too afraid to return to their communities after the conflict. Accordingly, many victims were displaced from their home towns and support networks.<sup>57</sup>

The *RUF* trial, although not conclusively defining the crime of forced marriage, made progress by implying that the crime is a result crime and introducing the possibility that forced marriage could be prosecuted under several different theories under international law.

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53. Rachel Slater, *Gender Violence or Violence Against Women? The Treatment of Forced Marriage in the Special Court for Sierra Leone*, 13 MELB. J. INT’L L. 732, 740 (2012).

54. *RUF Judgement*, ¶ 1295.

55. *Id.* ¶ 1296.

56. *Id.* ¶ 1472.

57. *Id.* ¶ 1474 (discussing forced marriage in the context of outrages against personal dignity).

### 3. Charles Taylor *case*

In the *Prosecutor v. Charles Taylor* case, forced marriage was not specifically charged.<sup>58</sup> However, the issue was addressed *sua sponte* in the trial chamber judgment.<sup>59</sup> In dicta, the judgment acknowledged forced marriage as a compound crime, with both sexual and non-sexual elements.<sup>60</sup> The Chamber stated: “[T]his conjugal association was not marriage . . . and should rather . . . be considered a conjugal form of enslavement.”<sup>61</sup> Defining forced marriage as a type of conjugal enslavement, or sexual slavery, would, in the eyes of the Chamber, alleviate the stress that comes from a new crime that requires courts to define new elements.<sup>62</sup>

The Special Court for Sierra Leone made substantial, but unsatisfying, progress in recognizing forced marriage as a crime against humanity. In the three trials that have specifically dealt with the crime, there was neither a consensus as to whether forced marriage exists as a crime against humanity, nor the development of a comprehensive definition of the crime. Further, any progress made by the *AFRC* Appeals chamber and the *RUF* trial chambers is obfuscated by the more recent *Taylor* decision.

### 4. *Inadequacies of the current treatment of forced marriage*

Currently, international recognition of forced marriage as a crime against humanity is inadequate. First, there has not been an adequate articulation of what constitutes the crime of forced marriage, nor a consensus as to its status as a crime against humanity. The clearest definition of forced marriage came from the *AFRC* Appeals, which identified the crime as “a situation in which the perpetrator through his words or conduct . . . compels a person . . . to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.”<sup>63</sup> Despite this being the most detailed explanation of the crime, the subsequent *RUF* and *Taylor* cases differed in their interpretations of forced marriage. The *RUF*

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58. *Prosecutor v. Charles Taylor (Taylor Judgement)*, Case No. SCSL-03-01-T-1283, Judgement, (May 18, 2012).

59. *Id.* ¶¶ 422–30.

60. Slater, *supra* note 53, at 741–42 (referring to *Taylor Judgement*, ¶¶ 424–32).

61. *Taylor Judgement*, ¶ 427.

62. *Id.* ¶¶ 429–30.

63. *AFRC Appeals Judgment*, ¶ 196.

judgment neither affirmed nor denied the *Brima* definition, but merely discussed the unique suffering associated with the crime.<sup>64</sup> Afterwards, the *Taylor* judgment claimed that forced marriage is not a crime against humanity at all.<sup>65</sup> Additionally, scholarship on the topic mirrors the divided opinion over the existence and nature of the crime found in tribunals.<sup>66</sup> The Extraordinary Chambers in the Courts of Cambodia (ECCC) can both clarify and solidify the elements of the crime.

#### IV. THE CAMBODIAN CROSSROADS

Under the Khmer Rouge regime from 1974 to 1979, the government forced thousands of people into marriages and required them to consummate and maintain those marriages.<sup>67</sup> Refusal to enter or consummate marriages was punishable by beatings, rape, or death.<sup>68</sup> Marriages under this regime were unique, in that, unlike other situations where a soldier forced a woman to be his “wife,” Khmer Rouge officials almost exclusively forced two people to marry each other.<sup>69</sup> These marriages were marked with a ceremony, often involving many couples, where the new couple had to publically swear allegiance to each other and to the government, or *Angkar*, and promise that they would remain together.<sup>70</sup>

The unique fact patterns found under the Khmer Rouge regime present an opportunity to further establish that forced marriage is a crime against humanity. Whereas in previous tribunals the marriage involved a male perpetrator and a female victim, almost all cases under the Khmer Rouge involved two victims who were forced to marry by the government perpetrator. Both males and females were

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64. See *supra* text accompanying note 55.

65. See *supra* text accompanying note 61.

66. See, e.g., Jennifer Gong-Gershowitz, *Forced Marriage: A “New” Crime Against Humanity?*, 8 NW. U. J. INT’L HUM. RTS. 53 (2009) (stating that forced marriage is a primarily sexual crime, and without the sexual elements, the crime does not amount to a crime against humanity). *But see* Jain, *supra* note 28, at 1028–30 (claiming that sexual slavery is inadequate to cover forced marriages).

67. Toy-Cronin, *supra* note 2, at 552–53.

68. *Id.*

69. This was how the crime generally happened, but there were instances similar to the ICTY or SCSL where a soldier married a civilian against the victim’s will. Toy-Cronin notes a military woman marrying a man against his will and male soldiers marrying females of their choosing, against the women’s will. Toy-Cronin, *supra* note 2, at 549.

70. *Id.* at 551.

victims of forced marriage and both genders were also forced to have sexual relations within marriage.<sup>71</sup> Many people have testified of the *Angkar* forcing these circumstances under fear of death<sup>72</sup>. However, it should be noted that there are some accounts of local leaders allowing people (especially long-term party members, called “base people”) to request a specific person they would like to marry, but these people were also married in the mass ceremonies.<sup>73</sup> While both genders were forced into marriage, the current record includes more instances of sexual violence within marriage affecting women than men.<sup>74</sup>

The ECCC divided the cases by number rather than by name. Case 002 was brought against high-ranking Khmer Rouge officials Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith. Forced marriage was charged against the Accused in Case 002, but was not argued before the Court in Case 002/1.<sup>75</sup> It is anticipated that the crime will be addressed in the second part of the case, Case 002/2. However, given the aged and frail conditions of the defendants and the repeated inappropriate stalling tactics of the defense teams,<sup>76</sup> it is a very real possibility that Case 002/2 will not be heard to completion. Like most defense teams, the defense attorneys for the accused in Case 002 have done the typical appeals and objections, as

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71. *Id.* at 552–553.

72. *Id.* at 550–51.

73. *Id.* at 550.

74. I use this phrasing carefully for two reasons. First, the studies researched and all of the non-government agencies seem to focus primarily on women’s experiences in the war. Also, as hard as it is for women to discuss these issues, I believe that if sexual violence towards men did occur within a male-centric society, the men would be less likely to admit it. Men have societal expectations to be the aggressor sexually, and are expected to be stronger than women. A man, if assaulted by a woman sexually, would bear the “shame” of being raped and additionally have the stigma of being overpowered by the “weaker” sex. For example, Nakagawa Kasumi stated in her book that she could find no “victims of or witnesses to rape of men by female soldiers, despite quite a number of hearsay reports that such rapes were rampant.” NAKAGAWA KASUMI, GENDER-BASED VIOLENCE DURING THE KHMER ROUGE REGIME: STORIES OF SURVIVORS FROM THE DEMOCRATIC KAMPUCHEA (1975-1979) 42 (2008). It could be that the prevalence of men as victims was indeed less, but it could also be that men are just less willing to discuss the topic. It is probably some combination of the two factors.

75. Case Load, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA <http://www.eccc.gov.kh/en/caseload>. For the sake of reaching a verdict, Case 002 was broken down into two smaller cases through a severance order. Case 002/1 reached a verdict in 2014 and Case 002/2 has been substantially delayed by the defense lawyers’ stalling tactics.

76. See Press Release, Extraordinary Chambers in the Courts of Cambodia, Counsel for Khieu Samphan and Nuon Chea warned for misconduct and ordered to appear at Trial Management Meeting (Oct. 24, 2014), <http://www.eccc.gov.kh/en/articles/counsel-khieu-samphan-and-nuon-chea-warned-misconduct-and-ordered-appear-trial-management-m>.

expected. However, their tactics have expanded past the regular stall tactics to the point where they are bordering upon the issuance of sanctions. The defense teams have disrupted the trials by refusing to appear in court, despite being ordered multiple times.<sup>77</sup> Due to age-related issues, the defendants could pass away or drift into mental incompetence before the conclusion of the trial.<sup>78</sup> Once one of the accused passes away or is unfit for trial, the opportunity for the international community to hold them accountable for their actions ends.<sup>79</sup>

Either way, the ECCC has an opportunity to both provide some recognition of the crime, and further progress how the crime is understood within the international legal community. The ECCC can use this opportunity to make four significant strides in the field of forced marriage as a crime against humanity. In making this progress, there are also some potential pitfalls that the ECCC must be careful to avoid.

#### V. CAMBODIAN FURTHERANCE OF THE CRIME OF FORCED MARRIAGE

The ECCC can further forced marriage as a crime against humanity in four key ways. First, the ECCC can clarify the elements of the crime, specifically the *actus reus* and the *mens rea*. Second, the court can solidify that forced marriage satisfies the *chapeau* element of crimes against humanity, and that it is sufficiently serious to merit inclusion as a crime against humanity. Third, the ECCC can use the unique manifestation of the crime of forced marriage under the

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77. *Id.*

78. Case 002, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA <http://www.eccc.gov.kh/en/case/topic/2>. Both Ieng Thirith and Ieng Sary were accused in Case 002, and both of their cases are not currently being prosecuted. Ieng Thirith became mentally incompetent and her trial was suspended in 2012. Unless medical treatment that reverses dementia is developed, it is highly unlikely her case will resume. Her husband, Ieng Sary died in 2013 and charges against him were terminated.

79. International law has set a precedent of not holding trials after the accused has died. Hitler, Pol Pot, Ieng Sary, etc. exemplify this practice. There are two more cases, Case 003 and Case 004, that could be brought in the ECCC, but Prime Minister Hun Sen has vowed that these cases will not be allowed. See Cheang Sokha & James O'Toole, *Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC*, THE PHNOM PENH POST, October 27, 2010; Herbert D. Bowman, *Not Worth the Wait: Hun Sen, The UN, and the Khmer Rouge Tribunal*, 24 UCLA PAC. BASIN L.J. 51, 78–80 (2006). Additionally, it is unclear as to what the charges will be in these cases.

Khmer Rouge to distinguish it from sexual slavery. Finally, the court can highlight that forced marriage extends beyond a perpetrator-victim relationship.

*A. Clarify the Elements of the Crime*

*1. Actus reus*

Of necessity, forced marriage, like murder, must be a result crime.<sup>80</sup> The law seeks to punish the harm resulting from the act.<sup>81</sup> As with murder, the ultimate purpose of prosecuting those who commit forced marriage is “to prevent or punish a harmful *result*,” namely the imposition of a forced marriage.<sup>82</sup>

At first glance, it would appear that there are only two questions to determine whether the result was accomplished, and therefore the crime committed. First, was there a marriage? If yes, did all parties consent? Logically, where a marriage existed, but consent did not, the actus reus seems to be met. This was the approach of the *RUF* trial, which stated that the actus reus was “the imposition of a forced conjugal association.”<sup>83</sup> While this definition fits the situation within the SCSL context, further language should be added to make the crime more inclusive.

One leading forced marriage scholar explained that his suggested actus reus is satisfied when:

[1] the perpetrator conferred a status of marriage, through words or conduct, on one or more persons, by force or coercion, for example through fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment or such person’s incapacity to give genuine consent (in this respect, it is understood that a decision to remain in the forced marriage or its transformation into a consensual situation does not affect the original criminality of the act);

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80. Logically speaking, if the harm of forced marriage comes from the imposition of a marital relationship, if no marital relationship is forced, it follows that no crime or harm has happened.

81. See JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 147 (6th ed. 2012).

82. *Id.* at 127 (emphasis added).

83. *RUF Judgment*, ¶ 1295.

[2] the perpetrator caused such person to engage in conduct similar to that arising out of a marriage relationship, including prolonged association, acts of a sexual nature, domestic labour, child bearing and the rendering of other conjugal duties.<sup>84</sup>

This proposition explains more, yet still remains inadequate. By enumerating post-marriage events, it seems as if the crime needs to have one or all of these events for the crime to happen. However, in many cases, the title of marriage alone can render the person “damaged goods,” impose the psychological harm, and affect their life as much as if there was a prolonged association, domestic labor, or other conjugal duties.<sup>85</sup>

A better proposed definition for the crime is: forced marriage occurs where an individual or organization confers a status of marriage—regardless of age, gender, or sex—through words, conduct or ceremony, on one or more persons by force or coercion for any amount of time that results in the one forcing, and/or the one being forced to believe that conjugal status has been bestowed. This definition would encompass enough to cover both genders and provide protection against all forms of forced marriage.

As a result crime, there are many questions as to what is needed to actually achieve the result of this crime. Does there have to be a marriage ceremony? If not, how many times does the title “marriage” need to be applied? Are there any temporal requirements such as length of captivity or duration of the conjugal association? Does the marriage have to be exclusive for one or both parties?<sup>86</sup>

While there are several scholars very concerned about the *actus reus* of the crime, it may be useful to compare forced marriage to the domestic law of rape. Initially, the definition of what constituted rape was inadequate, as it did not protect against women raping men, husbands raping their wives, object rape, etc. Not every situation was expressly covered, but the essence of the law is in the definition, people understand what that essence is, and judges are trusted to make the final application of the law. Forced marriage can avoid

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84. Jain, *supra* note 28, at 1031 (footnote omitted).

85. It goes without saying that if acts of sexual nature or childbearing are present, the crime takes on an added layer of gravity. Theoretically, if no acts of sexual nature are performed during the “marriage,” it is possible that the woman would be not considered “damaged goods”; however, no instances of this situation were found.

86. Many of these questions were posed by Jennifer Gong-Gershowitz. See Gong-Gershowitz, *supra* note 66, at 71.



many of the actus reus problems that plagued the crime of rape by making a clear, inclusive actus reus.

## 2. *Mens rea*

The mens rea is unlikely to require a higher standard than knowledge.<sup>87</sup> The crimes of enslavement and forcible transfer of population both do not include a specific mens rea beyond the general mens rea requirement tied to the *chapeau* element of the crime. Prosecutors would obviously prefer this lower level of mens rea because if the crime rises to the level of where it would be prosecuted, proving the mens rea would not require additional proof beyond what would be necessary to prove the *chapeau* element.

However, even if intent—the common mens rea requirement for crimes against humanity—is used, the likelihood of a successful prosecution would not be harmed. If the intent requirement is used, the phrasing should resemble “with intent to confer a conjugal association.”

### *B. Forced Marriage Meets the Chapeau Element and Gravity Requirements*

Two issues have hindered the establishment of forced marriage as a crime against humanity. First, whether forced marriage meets the *chapeau* element of a crime against humanity. Second, whether forced marriage is of sufficient gravity to be a crime against humanity.

#### 1. *Chapeau element*

In order to be prosecuted under widespread international law, forced marriage must meet the *chapeau* elements of every crime against humanity, to wit: “(i) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (ii) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.”<sup>88</sup> The *chapeau* element of crimes

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87. Generally speaking, the mens rea for a crime against humanity is “with knowledge.” Rome Statute, *supra* note 13, art. 7(1). However, as the crime of extermination highlights, some crimes against humanity have a more specific mens rea requirement. This Section addresses both possibilities in the alternative.

88. Jain, *supra* note 28, at 1031.

against humanity, in general or within the ECCC, are not contested,<sup>89</sup> and could be met in other instances of the crime outside of the ECCC. The *AFRC* Appeals Chamber has already provided excellent analysis of this issue.<sup>90</sup> Within the ECCC, judges and prosecutors could use the analysis of the *chapeau* element from the *AFRC* Appeals Chamber in their analysis of the crime within the ECCC to solidify that forced marriage meets those qualifications.

## 2. Gravity of the crime

Forced marriage, like all crimes with sexual elements, leaves serious marks on its victims. Rape and sexual slavery often leave mental, physical and emotional scars. In addition to the scars these events leave, in many cases the victims are ostracized from their home community, as they are no longer viewed as “pure.” If, by merely being raped, a person is shunned by their family and community, how much more would that person be ostracized if they allowed themselves to marry the enemy? They return not only “impure,” but also as someone who married the enemy.

Further, when compared to some of the other crimes against humanity, it is clear that forced marriage is as damaging to the victims as many of the other crimes in this category. At the very least, forced marriage could be brought as an “other inhumane act.” The *AFRC* Appeals Chamber found jurisprudence from international tribunals that found “other inhumane acts” was a somewhat broad catchall, and have included acts of sexual nature in the other inhumane act category such as: “sexual and physical violence perpetrated upon dead human bodies,”<sup>91</sup> “forced undressing of women and marching them in public,”<sup>92</sup> “forcing women to perform exercises naked,”<sup>93</sup> and “confinement in inhumane conditions.”<sup>94</sup> Forced marriage is more serious and has much longer lasting results than many of these examples. If these examples can meet the requisite minimum standard to fall within the “other inhumane acts”

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89. Interestingly, the *chapeau* element of genocide was extremely controversial in the ECCC. Millions of Cambodians died under the Pol Pot era, but because their deaths were not intended to exterminate the population, the millions of deaths were not considered genocide.

90. *AFRC Appeals Judgment*, ¶¶ 181–86.

91. *Id.* ¶ 184.

92. *Id.*

93. *Id.*

94. *Id.*

category of crimes against humanity, surely forced marriage deserves the same distinction.

*C. Distinguish Forced Marriage and Sexual Slavery*

The *AFRC* trial chamber stated that forced marriage “is completely subsumed by the crime of sexual slavery.”<sup>95</sup> Forced marriage is not sexual slavery. Despite the possibility of substantial overlap, the two crimes are distinguishable.

As perpetrated in the Sierra Leone conflict, it is understandable why the trial chamber of the *AFRC* case debated whether forced marriage was really just another embodiment of sexual slavery. Some have claimed “once the elements of sexual slavery are removed, only the label—wife—remains to distinguish between the crime of sexual slavery as defined by the *AFRC* Trial Judgment and the ‘new’ crime of ‘forced marriage.’”<sup>96</sup> However, forced marriage under the Khmer Rouge highlights that this is a misperception. The ECCC has the opportunity to show that the crime of forced marriage is not merely sexual slavery or just sexual slavery plus the title of marriage. The forcing of marital relation itself can leave lasting damage to the victims, whether or not sexual slavery is present.

Under the Khmer Rouge, marriages were enforced because that was the only morally acceptable way sex, and consequently population growth, could occur.<sup>97</sup> However, in these instances, there was no ownership of person as suggested by the term “slavery,” but rather the relationship appeared more like a partnership than slavery.

Within the marriages, sexual relations between the couple were encouraged, and sometimes forced, but the marriage was not primarily a sexual relationship by nature.<sup>98</sup> One couple did not consummate the marriage and neither wanted to have sex.<sup>99</sup> However, both were seen in the community as having promised to remain married and loyal to the *Angkar*. Neither ownership nor

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95. *AFRC Trial Judgment*, ¶ 713.

96. Gong-Gershowitz, *supra* note 66, at 60.

97. Toy-Cronin, *supra* note 2, at 545.

98. *Id.* at 545–46 (claiming that the Khmer Rouge believed that sexual relationships were a distraction); *id.* at 552–54 (stating that newlyweds did not live together, and the wife could only visit the husband a few times a month when she believed herself fertile).

99. *Id.* at 553.

sexual relations was present in this agreement, yet it still had long lasting, devastating effects on both husband and wife.<sup>100</sup>

Further, sexual relations varied according to the relationship; some only had sex when they felt threatened, some men viewed the forced marriage as valid and expected their wives to provide sex accordingly, and some men raped their wives.<sup>101</sup> However, the primary harm from the crime was due to the status of marriage imposed rather than the sexual aspects. As one historian notes: “[t]he puritanism of the regime restricted many newlyweds from living together and provided for conjugal visits a few times a month when the wife believed herself fertile.”<sup>102</sup>

Nonetheless, there is a similar quality between forced marriage and slavery. In forced marriages, at least one party often feels as though they cannot escape the marriage. In Cambodia today, nearly forty years after forced marriages occurred under the Khmer Rouge, there remain many couples that maintain their forced marriages.<sup>103</sup>

*D. Highlight that Forced Marriage Extends to more than Perpetrator-Victim Relationships*

The crime of forced marriage has historically been tied to a male perpetrator taking a female victim. As one scholar explained “[b]roadly, ‘forced marriage’ involves a female being married, against her will, to a male.”<sup>104</sup> Another scholar focused on “conceptuali[zing] forced marriage as a gender crime.”<sup>105</sup> While this form may be the most statistically likely way the crime has occurred in the past and will most likely happen in the future, the events under the Khmer Rouge highlights that there are other iterations of this crime.

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100. *Id.* at 553–54.

101. Toy-Cronin, *supra* note 2, at 553–54.

102. ELIZABETH BECKER, *WHEN THE WAR WAS OVER: THE VOICES OF CAMBODIA’S REVOLUTION AND ITS PEOPLE* 267 (1986).

103. Toy-Cronin, *supra* note 2, at 586–87.

104. Amy Palmer, *An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of “Forced Marriage,”* 7 *NW. J. INT’L HUM. RTS.* 133, 133 (2009).

105. Slater, *supra* note 53, at 735.

## VI. DISTINCTIONS BETWEEN FORCED AND ARRANGED MARRIAGE

By making the steps in Section V, the ECCC can set the tone for future trials. However, the ECCC must not make the mistake of confusing arranged marriage and forced marriage.

The steps forward that the ECCC makes will have to be incremental. Simply put, marriage is a sensitive area. Attempts to regulate or change marriage in America have been met with opposition both in interracial<sup>106</sup> and same-sex marriage,<sup>107</sup> highlighting that changing how people view their traditions surrounding marriage is a sensitive area. While forced marriage needs to be eliminated in all its forms, the practice of arranged marriage is still considered valid by many cultures. Especially in South Asian and African cultures, arranged marriage is an accepted tradition.

The difference between forced marriage and arranged marriage is often blurry, but arranged marriages are marked by “consent” of both parties. However, the difference between free consent and consent garnered by emotional blackmail is often paper-thin. While a strong record of prosecuting forced marriage as a crime against humanity may help to condemn arranged marriages that use force in the future, a statement that can be interpreted as condemning the practice of arranged marriages would likely be rejected by many countries.

## VII. CONCLUSION

Forced marriage is still happening today. In the Middle East, ISIS has stated that it has started taking women from villages as wives, most likely against the women’s wishes.<sup>108</sup> If these marriages

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106. Sixteen states still had laws prohibiting interracial marriage at the time of the *Loving v. Virginia*, 388 U.S. 1 (1967) decision. After the decision, reluctant groups fought against interracial marriage in cases like *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). The fact that several states had laws specifically banning the practice and that lawsuits were being brought about interracial marriage years later highlights a hesitancy to change marriage practice among at least a portion of the population.

107. For example, a Kentucky county clerk who was jailed for refusing to issue same-sex marriage licenses in the wake of the *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) decision was called a “hero” by some. See, e.g., Caleb Parke, *Opinion: Kim Davis is a Hero*, FOX NATION (Sept. 3, 2015), <http://nation.foxnews.com/2015/09/03/opinion-kim-davis-american-hero>.

108. See, e.g., *Iraq: ISIS Escapees Describe Systematic Rape*, HUMAN RIGHTS WATCH (Apr. 14, 2015), <https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape> (describing forced marriage as one of the many sexual crimes being committed by ISIS).

are forced, it will virtually ruin these women's future as part of a culture that prizes virginity and shuns divorced women. They will become the newest victims to the newest crime against humanity. In Africa, Boko Haram also makes the claim that some of the girls they have kidnapped have been "married off."<sup>109</sup> Boko Haram and ISIS have forced hundreds, possibly thousands, of girls into marriages within the past two years. As victims of forced marriage, these women will have a choice to stay in an unwanted marriage, or live as an outcast and shame to their family. While the details of commission of this crime by ISIS and Boko Haram remain unclear, what remains clear is the victims' lives will never be the same.

The future of forced marriage as a crime against humanity is complicated. As the world moves to a more culturally homogeneous society, the stigma of those who were forced into marriage will likely decrease. As divorce becomes ever more prevalent, the stigma surrounding divorcees is likely to decrease. As more of the world understands that contracts entered into under duress are void, the crime of forced marriage may diminish generally. These factors together may eventually lead to the crime no longer being prosecuted. In the meantime, however, forced marriage can destroy lives as much as any other crime against humanity, and should be treated as such.

Forced marriage is a devastating but overlooked crime. The events that happened under the Khmer Rouge open a possibility for progression in the crime of forced marriage, but the present situation of the ECCC greatly narrows what could happen with the charges. Ideally, the Trial Chamber will have the opportunity to address the crime in 002/2 within the next few years, if the accused remain alive and healthy. Alternatively, (perhaps for the sake of discussing the crime in some degree) the Supreme Court Chamber could address the crime, *sua sponte*, in its judgment of the 002/1 Appeal, similar to the forced marriage discussion in the *Taylor* case. The ECCC must use this opportunity to do so for those harmed in the past, those currently being harmed, and the victims of the crime in the future.

*Cameron Christensen*\*

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109. Faith Karimi & Aminu Abubakar, *Boko Haram Leader Denies Ceasefire Deal, Says 200 Abducted Girls Married Off*, CNN (Nov. 2, 2014, 1:26 PM), <http://www.cnn.com/2014/11/01/world/africa/nigeria-boko-haram-denies-deal/>.

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