

Forced Marriage Real Simple

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Abstract

The concepts of ‘real rape’ and ‘real rape victim’ play a key role in the reporting and prosecution of rape cases and strongly influence their outcomes. Similar biases and misconceptions obscure other acts of gender-based violence such as forced marriage in times of armed conflict. This paper analyses how the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the International Criminal Court construct and reconstruct the concepts of a ‘real’ and ‘simple forced marriage’. It argues that the difference lies in the elements of consent, coercion, duration and purpose. The paper highlights the gendered everyday realities in which myths surrounding conflict-related forced marriage are embedded and then taken for granted and accepted as normal, contributing to the denial, downplay or justification of acts of violence against women. It argues that by reinforcing these concepts, courts miss an opportunity to educate the legal community and the public about women’s experiences in peace and wartime and to develop a definition of the crime of forced marriage that reflects women’s realities.

I. Introduction

The concepts of ‘real rape’ and ‘real rape victim’ play a key role in the reporting and prosecution of rape cases and strongly influence their outcomes.¹ Encompassed within these concepts is the idea that ‘real rape’ is perpetrated in a surprise attack at night in a public, deserted place by a male stranger who uses physical violence against a young, respectable, white, female victim who resists but is overpowered and sustains multiple injuries. ‘Simple

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¹ K Weis and SS Borges, ‘Victimology and Rape: The Case of the Legitimate Victim’ (1973) 8(2) Issues in Criminology 71; LS Williams, ‘The Classic Rape: When Do Victims Report?’ (1984) 31 Social Problems 459; RT Andrias, ‘Rape Myths: A Persistent Problem in Defining and Prosecuting Rape’ (1992) 7 Criminal Justice 2; M White Stewart, SA Dobbin and SI Gatowski, ‘“Real Rapes” and “Real Victims”: The Shared Reliance in Common Cultural Definitions of Rape’ (1996) 4 Feminist Legal Studies 159; J Du Mont, K Miller and TL Myhr, ‘The Role of “Real Rape” and “Real Victim” Stereotypes in the Police Reporting Practices of Sexually Assaulted Women’ (2003) 9 Violence Against Women 466; S Estrich, ‘Real Rape’ in B Arrighi (ed), *Inequality: The Intersection of Race/Ethnicity, Class, and Gender* (Rowman and Littlefield Publisher 2007); L Ellison and VE Munro, ‘A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study’ (2010) 13 New Criminal Law Review: An International and Interdisciplinary Journal 781; L Ellison and VE Munro, ‘Better Than the Devil You Know: Real Rape Stereotypes and the

rape', in contrast, occurs within the private sphere and is perpetrated by a man known to the victim who shows no obvious signs of resistance or violence.² The pervasiveness of these concepts in and outside of the criminal justice system results in the disqualification of, and underreporting by, women who do not consider themselves 'real victims' and their experiences 'real rape'.³ It shifts the focus from the acts of the perpetrator to those of the survivor who is treated with suspicion and a lack of sensitivity, faced with victim blaming attitudes and subjected to intrusive questioning about their state of mind based on their actions and inactions.⁴ This leads to a majority of rapes being disregarded as the grave harm, injury to personal integrity and act of aggression that they are.⁵

Similar biases and misconceptions exist in relation to other acts of gender-based violence, forced marriage in times of armed conflict being one of them. Stories of women in Sierra Leone and Uganda invoke images of conflicts where male fighters abduct women and girls, take them to their camp, label them a fighter's wife and subsequently subject them to various acts of physical, sexual and psychological violence, including rape, forced pregnancy, forced labour, corporal punishment and enslavement.⁶ Similarly, stories of Malian women call attention to the highly coercive environment of cities under armed occupation that pervert traditional marriage practices.⁷ Stories of women and men in Cambodia highlight the brutality and all-encompassing ideological rigidity of

Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17 International Journal of Evidence & Proof 299.

² Williams (n 1); Andrias (n 1); Du Mont, Miller and Myhr (n 1); Estrich (n 1); Ellison and Munro, 'Better Than the Devil You Know' (n 1); Eithne Dowds, 'Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force' (2020) 83 Modern Law Review 35.

³ Williams (n 1); Stewart, Dobbin and Gatowski (n 1); Du Mont, Miller and Mhyr (n 1); Dowds (n 2).

⁴ Andrias (n 1); Dowds (n 2).

⁵ Williams (n 1); Stewart, Dobbin and Gatowski (n 1); Du Mont, Miller and Mhyr (n 1).

⁶ K Carlson and D Mazurana, 'Forced Marriage within the Lord's Resistance Army, Uganda' (2008) Tufts University Feinstein International Center <<https://fic.tufts.edu/wp-content/uploads/Forced+Marriage+within+the+LRA-2008.pdf>> accessed 27 April 2020; C Coulter, *Bush Wives and Girl Soldiers: Women's Lives through War and Peace in Sierra Leone* (Cornell University Press 2009); J Annan and C Blattman, 'On the Nature and Causes of LRA Abduction: What the Abductees Say' in B Allen and K Vlassenroot (eds), *The Lord's Resistance Army: Myth and Reality* (Zed Books 2010); A Bunting, 'Forced Marriage' in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes' (2012) Canadian Journal of Human Rights 165; S Kramer, 'Forced Marriage and the Absence of Gang Rape: Explaining Sexual Violence by the Lord's Resistance Army in Northern Uganda' (2012) 23(1) Columbia University Journal of Politics and Society 11.

⁷ KK Paterson, 'Mali Conflict is Latest to Employ Forced Marriage as Tool of War' (4 June 2013) Women's Media Centre <<https://www.womensmediacenter.com/women-under-siege/mali-conflict-is-latest-to-employ-forced-marriage-as-tool-of-war>> accessed 29 April 2020; R de Jorio, 'Conflict-Related Gender-Based Violence in Mali and the Limits of the Global System of Law' (2019) 21 Mande Studies 33; V Oosterveld, 'Forced Marriage: Terminological Coherence and Dissonance in International Criminal Law' (2019) 27 William & Mary Bill of Rights Journal 1263.

the Khmer Rouge regime that married strangers in mass ceremonies and forced them to consummate their marriage and procreate as a step in their socialist revolution and creation of a new society.⁸ Their stories become stories of ‘real forced marriage’.

Comparatively, stories of Cambodian men and women who consented to marriage,⁹ of Malian women who were temporarily married to members of Ansar Eddine and Al Qaeda in the Islamic Maghreb with the apparent consent of their families to allow sexual intercourse,¹⁰ of Malian and Sierra Leonean women who arguably married, or were married off, for survival, protection and access to resources,¹¹ and of Sierra Leonean women who were forced into marriage with fighters of the Armed Forces Revolutionary Council (AFRC) or the Revolutionary United Front (RUF) and stayed with their forced husband without attempting to escape¹² become stories of ‘simple forced marriage’.

This article analyses how the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Court (ICC) construct and reconstruct the concepts of a conflict-related ‘real’ and ‘simple forced marriage’. It highlights the gendered everyday realities in which those concepts are embedded and then taken for granted and accepted as normal, contributing to the denial, downplay or justification of acts of violence against women.¹³ By reinforcing these concepts, the courts miss an opportunity to educate the legal community and the public about women’s ex-

⁸ B Ye, ‘Forced Marriages as Mirrors of Cambodian Conflict Transformation’ (2011) 23 Peace Review 469; S Studzinsky, ‘Neglected Crimes: The Challenge of Raising Sexual and Gender-Based Crimes before the Extraordinary Chambers in the Courts of Cambodia’ in S Buckley-Zistel and R Stanley (eds), *Gender in Transitional Justice* (Palgrave Macmillan 2012); S Studzinsky, ‘Victims of Sexual and Gender-Based Crimes before the Extraordinary Chambers in the Courts of Cambodia: Challenges of Rights to Participation and Protection’ in ALM de Brouwer and others (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013); Oosterveld, ‘Forced Marriage’ (n 7).

⁹ *Co-Prosecutor v Chea Nuon and Samphan Kieu* (Trial Judgment) 002/19-09-2007/ECCC/TC ‘Case 002’ (16 November 2018) para 3617ff.

¹⁰ *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud) ICC-01/12-01/18 ‘Al Hassan’ (13 November 2018) para 563ff.

¹¹ *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Trial Transcript) SCSL-2004-15-T ‘RUF Case’ (23 November 2005); *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Trial Judgment) SCSL-04-15-T ‘RUF Case’ (2 March 2009) para 1413; *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Public Redacted Version of the ‘Prosecution’s Final Written Observations Regarding Confirmation of the Charges’, 24 July 2019, ICC-01/12-01/18-430-Conf) ICC-01/12-01/18 ‘Al Hassan’ (13 November 2018) para 42.

¹² *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Prosecution Filing of Expert Report Pursuant to Rule 94(bis) and Decision of Prosecution Request for Leave to Call an Additional Expert Witness) SCSL-04-16-T ‘AFRC Case’ (8 August 2005); *RUF*, ‘Trial Judgment’ (n 11) paras 1293, 1407-1408, 1467.

¹³ Stewart, Dobbin and Gatowski (n 1); Ellison and Munro, ‘A Stranger in the Bushes’ (n 1).

periences in peace and wartime and to develop adequate definitions of crimes that reflect women's realities.¹⁴

2. The Cases

Since the SCSL took up its work in 2002,¹⁵ international and hybrid courts have addressed forced marriage in the context of different conflicts and have categorised, defined and understood the crime in different ways.

The SCSL dealt with cases of forced marriage committed by the AFRC and RUF during the civil war in Sierra Leone between 1991 and 2002. Members of fighting groups abducted or captured civilian women and girls, forced them into unlawful marriages to fighters and subsequently subjected them to various acts of gender-based psychological, physical and sexual violence.¹⁶ In an attempt to explain the perpetration of conflict-related forced marriages in Sierra Leone, they are compared to peacetime conventions of marriage by capture that are pushed into the context of conflict. However, a more nuanced understanding would consider the lack of material wealth of fighting groups. In this context, forced wives are used as a low-cost payment system and seen as remuneration for fighters' bravery. The number of forced wives then also becomes a status symbol with higher ranking fighters being assigned, or allowed to choose, more wives than fighters of lower rank. In addition to indicating a fighter's social status, forced marriage also indicates his status as an adult man by providing an opportunity to fulfil a masculine ideal of marriage, parenthood and being the provider for, and protector of, wives and children. Forced wives, in turn, become an inherent part of a fighting group's organisational structure and are coerced into participating in direct combat, performing domestic work and acting as wives to their forced husbands and as mothers to the children born into forced marriages. This indicates that their presence in fighting groups is of vital importance for the creation of bonds and dependency structures that are intended to advance the creation of a new social order, increase unit cohesion and stability, and reduce the likelihood of escape in an already extremely coercive environment. Contrary to this, forced marriage also strategically serves the

¹⁴ Andrias (n 1).

¹⁵ The Residual Special Court for Sierra Leone and the SCSL Public Archives <<http://www.rscsl.org/>> accessed 15 April 2020.

¹⁶ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Trial Judgment) SCSL-04-16-T 'AFRC Case' (20 June 2007) para 701ff; *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Appeals Chamber Judgment) SCSL SLS-2004-16-A 'AFRC Case' (22 February 2008) para 175ff; *RUF*, 'Trial Judgment' (n 11) paras 1291ff, 1460ff; *Prosecutor v Charles Taylor* (Trial Judgment) SCSL-03-01-T (18 May 2012) paras 418-421; The Residual Special Court for Sierra Leone and the SCSL Public Archives (n 15).

military objective of demoralising and disabling the opponent by dissolving social bonds in families and communities.¹⁷

In addition to the SCSL, the ECCC addressed forced marriages that were perpetrated as part of a nationwide policy during the 1975-1979 reign of the Khmer Rouge. Here, the regime held mass ceremonies in which it forced men and women into lawful marriages. Often the spouses were strangers who were matched based on their similar backgrounds and married without advance notice or a way to refuse. They were then pressured to consummate the marriage and to have children. In Cambodia, forced marriages were part of the ruling party's socio-economic programme to reconstruct the country and its society as part of a socialist revolution. Forced marriages were a means to control sexual relations between men and women with the goal to rapidly increase the population of 'desirable citizens' through births in an attempt to socially engineer the future population through forced procreation.¹⁸

Thirdly, the ICC currently deals with forced marriages perpetrated during the armed conflicts in Uganda since 2002 and Mali in 2012/13 in the cases against Dominic Ongwen¹⁹ and Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud²⁰ respectively. In regard to forced marriage, the situation in Uganda is similar to that in Sierra Leone. A fighting group, the Lord's Resistance Army (LRA), abducts or captures civilian women and girls, forces them into marriage with fighters and subjects them to acts of sexualised violence and forced labour. This is done to control a person's sexuality, to reward fighters and to demonstrate and increase their status in the group, to keep the fighting group operational, to demoralise and disable the opponent, and to create bonds within the fighting group and a new social order in the wider society.²¹

¹⁷ LL Amowitz and others, 'Prevalence of War-Related Sexual Violence and Other Human Rights Abuses Among Internally Displaced Persons in Sierra Leone' (2002) 287 *Journal of the American Medical Association* 513; Coulter (n 6); V Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties' (2011) 2 *Journal of International Humanitarian Legal Studies* 127; Bunting (n 6).

¹⁸ *Co-Prosecutor v Chea Nuon, Sary Ieng, Samphan Khieu and Thirith Ieng* (Closing Order) 002/19-09-2007-ECCC-OCIJ 'Case 002' (15 September 2010) para 216ff; *Case 002*, 'Trial Judgment' (n 9) para 3522ff; Studzinsky, 'Neglected Crimes' (n 8); Studzinsky, 'Victims of Sexual and Gender-Based Crimes' (n 8); Oosterveld, 'Forced Marriage' (n 7).

¹⁹ *Prosecutor v Dominic Ongwen* (Decision on the Confirmation of Charges Against Dominic Ongwen) ICC-02/04-01/15 (23 March 2016) para 87ff.

²⁰ *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 563ff.

²¹ *Ongwen*, 'Decision on the Confirmation of Charges' (n 19) para 87ff; Amowitz and others (n 17); T Allen and M Schomerus, 'A Hard Homecoming: Lessons Learned from the Reception Center Process in Northern Uganda: An Independent Study' (2006) <http://pdf.usaid.gov/pdf_docs/PNADI241.pdf> accessed 27 April 2020; Carlson and Mazurana (n 6); Annan and Blattman (n 6); C Dauvergne and J Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73 *Modern Law Review* 57; J Annan and others, 'Civil War, Reintegration, and Gender in Northern Uganda' (2011) 55 *Journal of Conflict Resolution* 877; B Beber and C Blattman, 'The Logic of Child Soldiering and Coercion' (2011) <<http://chrisblattman.com/documents/research/2011.LogicOfChildSoldiering.pdf>> accessed 29 April 2020; JL Leatherman, *Sexual Violence and Armed Conflict* (Polity Press 2011); K Chantler,

In Mali, the city of Timbuktu was seized and fell under the control of Ansar Eddine and Al Qaeda in the Islamic Maghreb. In this context, women were forced into marriage through intimidation by armed men who used threats and physical violence if the victim or her parents refused their propositions and offers of money. Once married, women were subjected to acts of sexualised violence and in some cases raped repeatedly by several men in fighters' camps before they were swiftly divorced again. Some women also had to perform domestic tasks. In Mali, forced marriages were used as a means to gain and exercise control over the local population and their land. Like in Sierra Leone and Uganda, forced marriage was a way to form ties between members of the fighting group and the local population, to reward fighters and to allow sexual intercourse between members of the armed groups and local women and girls to create a new society.²²

3. Real Simple

In *AFRC, RUF, Case 002, Ongwen and Al Hassan*, the SCSL, ECCC and the ICC discussed the difference between forced and traditional marriages in Sierra Leone, Cambodia, Uganda and Mali. They also considered apparent benefits such as protection, socio-economic support and payments of money forced wives or their families received from forced husbands or through the marriage. Those relative benefits prompted some forced wives to stay with their forced husband sometimes even after the conflict had ended and deterred them from attempting to escape, something that was further discouraged through intimidation and threats of physical punishment and death. Through discussions of the differences between forced and traditional marriages, relative benefits and possibilities of escape, the courts examined the state of mind of the survivor rather than the actions of the perpetrators, indirectly asking if forced wives or their families consented to the forced marriage. An element of consent would mark a forced marriage as a 'simple' rather than 'real forced marriage'. However, the courts also recognised that coercive circumstances vitiate consent, making a forced marriage a 'real forced marriage'. Taking into account pre-existing as well as purposively created coercive environments returned the focus to the words and conduct of perpetrators. However, courts neglected wider historic, socio-political, and economic circumstances and their impact on interpersonal relationships in fighting groups. In addition to consent

'Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse' (2012) 13 *Trauma, Violence and Abuse* 176; Kramer (n 6).

²² *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 563ff; *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 8ff.

and coercion, the SCSL, ECCC and ICC indicated that the nature of a forced marriage determines if a forced marriage is a ‘real’ or a ‘simple forced marriage’. Temporarily limited unions that were formed predominantly for sexual purposes, for example, are seen as ‘simple’ rather than ‘real forced marriages’ because they were never meant to be a lifelong sacrosanct union²³ of two people that creates mutual obligations.²⁴

The following part of the article elaborates on these points. It argues that the courts’ construction of conflict-related ‘real’ and ‘simple forced marriages’ is based on biases and misconceptions that are embedded in taken-for-granted gendered everyday realities that contribute to the denial, downplay or justification of acts of violence against women. They have to be taken into consideration when developing a definition of the crime of forced marriage for the purpose of International Criminal Law to prevent patriarchal stereotypes from being enshrined in law and to ensure an appropriate reflection of survivors’ experiences.

3.1. Traditions as Proxies for Consent

In the *AFRC*²⁵ case, the SCSL considered the differences between traditional and early marriages on the one hand and conflict-related forced marriage on the other in an effort to understand the context, socio-cultural meaning and long-term consequences of forced marriages formed during the conflict in Sierra Leone. In doing so, they intended to highlight differences between acts they considered criminal and those locally accepted as normal. Based on the expert testimony of Zainab Bangura, the court stressed the importance of familial consent and marriage ceremonies in customary marriages and the absence of both in conflict-related forced marriages.

In *Case 002*, the ECCC distinguished traditional and forced marriages in Cambodia. It highlighted that traditional marriages were arranged by the

²³ Taylor, ‘Trial Judgment’ (n 16) para 427.

²⁴ *AFRC*, ‘Trial Judgment’ (n 16) para 711.

²⁵ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Hawa Bangura) Pursuant to Rule 73 bis (E), and on Joint Defence Notice to Inform the Trial Chamber of its Position vis-à-vis the Proposed Expert Witness (Mrs. Bangura) Pursuant to Rule 94 bis) SCSL-04-16-T ‘AFRC Case’ (5 August 2005); *AFRC*, ‘Prosecution Filing of Expert Report’ (n 12); *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Joint Defence Disclosure of Expert Report on Forced Marriages by Dr. Dorte Thorsen) SCSL-04-16-T ‘AFRC Case’ (21 August 2006); *AFRC*, ‘Trial Judgment’ (n 16) Judge Sebutinde Separate Concurring Opinion paras 10, 12; *AFRC* ‘Trial Judgment’ (n 16) Judge Doherty Partly Dissenting Opinion para 36; *AFRC*, ‘Appeals Chamber Judgment’ (n 16) para 194; J Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Brill 2013) 294-324; MC Ferme, ‘Consent, Custom, and the Law in Debates Around Forced Marriage at the Special Court for Sierra Leone’ in A Bunting, BN Lawrence and RN Roberts (eds), *Marriage by Force? Contestation over Consent and Coercion in Africa* (Ohio University Press 2016) 229-230.

spouses' parents with the consent or acquiescence of the bride and groom. They included a payment of a dowry and a wedding ceremony marked by communal and religious elements. In forced marriages, the Khmer Rouge regime took the place of the parents and authorised marriages of men and women who were matched based on age, class, status, location and ethnicity. Here, collective consent took priority over familial and individual consent. Couples were married in mass ceremonies in which spouses would 'make a resolution announcing their biographies and their loyalty to one another'²⁶ as well as to the regime. Once married, members of the regime forced or coerced them to consummate their marriage and procreate. While spouses lived separated, they were pressured to meet regularly for reproductive purposes. They could not refuse to marry or to consummate the marriage for fear of violence and death and they did not have the right to divorce.²⁷

The ICC discussed the difference between traditional and conflict-related forced marriages in *Ongwen* and *Al Hassan*. In the case against Dominic Ongwen, the Prosecutor highlighted the difference between traditional and conflict-related forced marriages in Uganda. She emphasised rites of courtship, the payment of a dowry and social benefits resulting from traditional marriages, and the absence of these elements in conflict-related forced marriages.²⁸

In the case against Al Hassan, the ICC began to explore the difference between traditional Malian marriages, temporary marriages recognised under Islamic law and forced marriage as allegedly perpetrated by members of Ansar Eddine and Al Qaeda in the Islamic Maghreb during the armed conflict in Timbuktu. Similar to traditional marriages in Sierra Leone, the court stressed that traditional forms of marriage in Mali are marked by individual or familial consent, the offer or payment of a dowry and the performance of a marriage ceremony.²⁹ In temporary marriages, the spouses are married for a limited period of time, sometimes with an exchange of money, with an easy way to divorce.³⁰ Conflict-related forced marriages in Mali were temporary marriages that involved a payment of a sum of money. Therefore, they included elements of traditional and temporary marriages. However, the ICC Prosecutor described

²⁶ SAO Sarun Interview Record as quoted in *Case 002*, 'Trial Judgment' (n 9) para 3567.

²⁷ *Case 002*, 'Trial Judgment' (n 9) paras 265-273, 3522ff.

²⁸ *Prosecutor v Dominic Ongwen* (Public Redacted Version of 'Prosecution Closing Brief') ICC-02/04-01/15 (24 February 2020) paras 162, 172.

²⁹ *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 565; *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 12.

³⁰ *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) paras 572, 581; JJ Nasir, *The Status of Women Under Islamic Law and Under Modern Islamic Legislation* (Graham and Trotman 1990); H Ahmed, 'Iraq' in J Breslin and S Kelly (eds), *Women's Rights in the Middle East and North Africa: Progress Amid Resistance* (Freedom House/ Rowman & Littlefield Publishers 2010).

forced marriage in Mali as ‘inherently coercive’³¹ as they were formed through intimidation and the use of physical violence in the context of an armed conflict by members of feared, armed and violent groups without the option to refuse.³²

In these cases, the courts indirectly raised questions about the lawfulness of the marriages and the state of mind of survivors and their families. If conflict-related forced marriages would be comparable to traditional marriages that are in accordance with domestic or customary law, they might not amount to ‘real forced marriages’. However, according to the ICC Pre-Trial Chamber II in *Ongwen*, the lawfulness or unlawfulness of a marriage is not an element of the crime of forced marriage.³³ This is supported by the findings of the SCSL³⁴ and the ECCC³⁵ as they determined that unlawful forced marriages in Sierra Leone as well as lawful forced marriages in Cambodia amounted to ‘real forced marriages’. As mentioned above, in Sierra Leone, members of fighting groups captured or abducted women and group leaders subsequently assigned them as wives to particular fighters. This indicates that conflict-related forced marriages disregarded domestic and customary laws that emphasised a period of courtship, individual or familial consent, the payment of a dowry and the holding of a marriage ceremony. Consequently, they were unlawful. Independent of this, the SCSL found that members of the AFRC as well as the RUF perpetrated ‘real forced marriages’.³⁶ In Cambodia, the Khmer Rouge regime developed a government policy on marriage that underlined the importance of the family as the basis for the development of a new society in accord with the ideology of its socialist revolution. The implementation of this policy meant a clear departure from traditional marriages based on children’s respect for their parents and religious beliefs and a move towards the subordination of the individual and familial to the collective that took a parental position and authorised, organised and monitored marriages. This policy was enforced, including by violent means, throughout Cambodia and the spouses and their families viewed these conflict-related forced marriages as fully valid. Nevertheless, the ECCC determined that they amounted to ‘real forced marriages’.³⁷

³¹ *Al Hassan*, ‘Prosecution’s Final Written Observations Regarding Confirmation of the Charges’ (n 11) para 163.

³² *Al Hassan*, ‘Rectificatif à la décision relative à la confirmation des charges portées’ (n 10) paras 564-582; *Al Hassan*, ‘Prosecution’s Final Written Observations Regarding Confirmation of the Charges’ (n 11) paras 12, 161.

³³ *Ongwen*, ‘Decision on the Confirmation of Charges’ (n 19) para 93.

³⁴ AFRC, ‘Appeals Chamber Judgment’ (n 16); RUF, ‘Trial Judgment’ (n 11).

³⁵ Case 002, ‘Trial Judgment’ (n 9).

³⁶ AFRC, ‘Prosecution Filing of Expert Report’ (n 12); AFRC, ‘Trial Judgment’ (n 16) para 701ff; AFRC, ‘Appeals Chamber Judgment’ (n 16) para 175ff; RUF, ‘Trial Judgment’ (n 11) paras 1291ff, 1460ff; Taylor, ‘Trial Judgment’ (n 16) paras 418-421; O Aijazi and E Baines, ‘Relationality, Culpability and Consent in Wartime: Men’s Experiences of Forced Marriage’ (2017) 11 International Journal of Transitional Justice 463, 471.

³⁷ Case 002, ‘Trial Judgment’ (n 9) para 3539; Ye (n 8); Oosterveld, ‘Forced Marriage’ (n 7) 1276.

While the lawfulness or unlawfulness of a conflict-related forced marriage does not appear to influence its classification as a ‘simple’ or ‘real forced marriage’, consent makes a difference and situations where victims or their families consented to the marriage might not be understood as ‘real forced marriages’.

In contrasting forced and traditional marriages in Sierra Leone³⁸ and Cambodia³⁹ as well as forced and temporary marriages in Mali,⁴⁰ the SCSL, ECCC and ICC emphasised and privileged familial over individual consent. Consequently, a marriage with the consent of the bride’s family but without the assent of the bride herself would be a ‘simple’ rather than a ‘real forced marriage’ as the element of familial consent is met and individual consent is optional.⁴¹ Here, the courts moved away from a liberal and Western individualistic notion of consent as enshrined for example in Article 16(2) of the Universal Declaration of Human Rights⁴² and began to recognise the existence and validity of some alternative types of consent.⁴³ However, by prioritising familial over individual consent, they built on and perpetuated the erasure of peacetime violations of women’s right to consent to marriage and assumed a benign nature of communities.⁴⁴

In *Ongwen*, the ICC Pre-Trial Chamber II took a different approach to consent and stressed that the ‘central element of forced marriage is the imposition of “marriage” on the victim, i.e. the imposition, regardless of the *will of the victim*, of duties that are associated with marriage, as well as of a social status of the perpetrator’s “wife” (emphasis added).⁴⁵ By emphasising ‘the will of the vic-

³⁸ AFRC, ‘Decision on Prosecution Request for Leave’ (n 25); AFRC ‘Prosecution Filing of Expert Report’ (n 12); AFRC, ‘Joint Defence Disclosure’ (n 25); AFRC, ‘Trial Judgment’ (n 16) Judge Sebutinde Separate Concurring Opinion paras 10, 12; AFRC, ‘Trial Judgment’ (n 16) Judge Doherty Partly Dissenting Opinion para 36; AFRC, ‘Appeals Chamber Judgment’ (n 16) para 194.

³⁹ Case 002, ‘Trial Judgment’ (n 9) paras 265-273, 352ff.

⁴⁰ *Al Hassan*, ‘Rectificatif à la décision relative à la confirmation des charges portées’ (n 10) para 565; *Al Hassan*, ‘Prosecution’s Final Written Observations Regarding Confirmation of the Charges’ (n 11) para 12.

⁴¹ United Nations Committee on the Elimination of Discrimination Against Women ‘Consideration of Reports Submitted by States Parties Under Article 19 of the Convention on the Elimination of All Forms of Discrimination against Women: 4th Periodic Reports of States Parties/Benin’ (21 March 2012) UN Doc CEDAW/C/BEN/4, 6; A Azonhoume, ‘Criminal Abuse of Women and Children in Benin’ in ONI Ebbe and DK Das (eds), *Criminal Abuse of Women and Children: An International Perspective* (CRC Press 2009) 140; J Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill 2015) 466-474; Ferme (n 25) 233.

⁴² Universal Declaration of Human Rights (10 December 1948) UN Doc A/RES/217 A (III).

⁴³ N Mkhize, ‘Communal Personhood and the Principle of Autonomy: The Ethical Challenges’ (2006) 24(1) CME 26, 28; A Bunting, BN Lawrence and RN Roberts (eds), *Marriage by Force? Contestation over Consent and Coercion in Africa* (Ohio University Press 2016) 15-17; Ferme (n 25) 230, 233-234; Aijazi and Baines (n 36) 465; SB Adjei, ‘Conceptualising Personhood, Agency, and Morality for African Psychology’ (2019) 29 Theory & Psychology 484.

⁴⁴ Allain, ‘Slavery in International Law’ (n 25); Ferme (n 25) 230.

⁴⁵ *Ongwen*, ‘Decision on the Confirmation of Charges’ (n 19) para 93.

tim',⁴⁶ the court focused on individual consent to marriage. In doing so, it suggested that a conflict-related forced marriage is a 'real forced marriage' if it is formed against the bride's will.

By extension, a forced marriage would also be a 'real forced marriage' if the victim is considered legally incapable of giving genuine consent to the marriage, for example because of their age.⁴⁷ Furthermore, minors exemplify 'real victims' who are young, vulnerable, helpless and in need of protection, making it more likely that their experiences of forced marriage are classified as 'real forced marriages'.⁴⁸ As demonstrated above, a focus on familial consent evades the classification of an early marriage as a 'real forced marriage' as the spouses' individual consent, or their inability to give genuine consent, is superseded by the consent of their families. The SCSL touched upon questions related to the minimum age for marriage especially in the AFRC case. However, these were subsumed under the more general distinction between traditional and conflict-related forced marriages in Sierra Leone and not explored further.⁴⁹

At trial stage in the AFRC case⁵⁰ as well as in the case against Charles Taylor,⁵¹ the court circumvented questions related to consent to marriage altogether by establishing conflict-related forced marriage as a form of the *jus cogens* crimes of sexual slavery and conjugal enslavement respectively.⁵² In addition to situating forced marriage in the context of historical and modern slavery and the struggle for its abolition and decolonialisation that highlights the seriousness

⁴⁶ *ibid.*

⁴⁷ AFRC, 'Trial Judgment' (n 16) para 1106; AFRC, 'Prosecution Filing of Expert Report' (n 12) 10-11; UNdata, 'Legal Age for Marriage' (11 July 2013) <<http://data.un.org/DocumentData.aspx?q=United+Kingdom+of+Great+Britain+and+Northern+Ireland&id=336>> accessed 21 April 2020; ICC Office of the Prosecutor, 'Policy on Children' (November 2016) <https://www.iccpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF> accessed 21 April 2020: The ICC considers children to be any person under the age of eighteen. Child soldiers, however, are persons under the age of fifteen who are enlisted, conscripted and participate actively in hostilities. Zainab Bangura explains in her expert testimony before the SCSL that Sierra Leone does not have an express legal minimum age stipulation for marriage. Instead, the minimum age for marriage depends on whether a woman is married under general, customary or Islamic law and in practice ranges from ten to eighteen years of age. According to data collected by the UN, the minimum age for marriage in Mali is fifteen for women and eighteen for men. In Uganda, the minimum age is eighteen for both spouses. However, as Bangura's analysis suggests, the minimum age for marriage in Mali and Uganda might be different in different legal systems.

⁴⁸ Williams (n 1); Andrias (n 1); Du Mont, Miller and Myhr (n 1); Dowds (n 2).

⁴⁹ AFRC, 'Prosecution Filing of Expert Report' (n 12).

⁵⁰ AFRC, 'Trial Judgment' (n 16) paras 704, 713.

⁵¹ Taylor, 'Trial Judgment' (n 16) para 427.

⁵² *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (New Application, 1962), Judgment, Merits, Second Phase, ICJ GL No 50, ICJ Rep 3 (1970) 9 ILM 227, ICJ 152 (ICJ 1970) (05 February 1970).

of the conduct, legally and socially, both categorisations signal a lack of consent.⁵³ Consequently, the state of mind of the survivor does not need to be examined and the investigatory focus is placed on the actions of the perpetrator. Moreover, under this label, the question of whether or not a conflict-related forced marriage is a 'real' or 'simple forced marriage' does not arise as the conduct is not seen as forced marriage in the first place and as a form of slavery or enslavement instead. Despite these advantages of categorising conflict-related forced marriage as a form of slavery or enslavement and despite forced marriages meeting the necessary element of perpetrators exercising powers attaching to the right of ownership over victims,⁵⁴ this categorisation does not fully address the unique and complex experiences of forced spouses, 'the harms and abuses suffered and the conditions or terms in which the harms occurred'.⁵⁵ Women were enslaved for purposes of forced marriage, including forced labour and impregnation. In the same vein, the victims were not only subjected to repeated sexual abuses in conditions in which they were deprived of their freedom, they suffered additional injuries such as stigmatisation and ostracisation arising from being labelled 'wives' and made to engage in duties associated with marriage.⁵⁶

⁵³ AFRC, 'Prosecution Filing of Expert Report' (n 12); AFRC, 'Trial Judgment' (n 16) paras 145-146; RUF, 'Trial Judgment' (n 11) paras 200, 1120; DS Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine' (2005) 15 Duke Journal of Comparative and International Law 219; H Baumeister, *Sexualised Crimes, Armed Conflict and the Law: The International Criminal Court and the Definitions of Rape and Forced Marriage* (Routledge 2018) 66-70, 193-194; A Raab and S Hobbs, 'Forced Relationships: Prosecutorial Discretion as a Pathway to Survivor-Centric Justice' (OpinioJuris, 13 September 2018) <<http://opiniojuris.org/2018/09/13/forced-relationships-prosecutorial-discretion-as-a-pathway-to-survivor-centric-justice>> accessed 21 April 2020.

⁵⁴ Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, Registered No. 1414 art 1(1); Assembly of States Parties to the Rome Statute of the International Criminal Court 'Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002' (9 September 2002) ICC-ASP/1/3 (Part II.B) art 7(1)(c), art 7(1)(g)(2), art 8(2)(b)(xxii)(2), art 8(2)(e)(vi)(2); *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (Trial Judgment) ICTY IT-96-23-T and IT-96-23/1-T 'Foča Case' (22 February 2001) para 543; J Gong-Gershowitz, 'Forced Marriage: A "New" Crime Against Humanity?' (2009) 8 Northwestern Journal of International Human Rights 53; Allain, *The Law and Slavery* (n 41); Allain, 'Slavery in International Law' (n 25).

⁵⁵ A Bunting and IK Ikimiukor, 'The Expressive Nature of Law: What We Learn from Conjugal Slavery to Forced Marriage in International Criminal Law' (2018) 18 International Criminal Law Review 331, 350. See also S Mattler and MP Scharf, 'Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime against Humanity' (2005) Case Research Paper Series in Legal Studies, Working Paper 05-35 <<http://ssrn.com/abstract=824291>> accessed 8 June 2020; Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone' (n 17); K Stout, 'What's in a Name? The Feasibility and Desirability of Naming Forced Marriage as a Separate Crime under International Humanitarian Law' (8 May 2012) <<http://de.scribd.com/doc/94709906/3/III-The-Constituent-Crimes-that-Underpin-the-Crime-of-Forced-Marriage>> accessed 8 June 2020.

⁵⁶ Bunting and Ikimiukor (n 55) 349.

To summarise, an element of consent shaped the SCSL's, ECCC's and ICC's understanding of a conflict-related forced marriage as a 'real' or 'simple forced marriage' albeit in different ways depending on the approach to consent. If a focus is placed on familial consent to marriage, the absence thereof is a marker of a 'real forced marriage'. In a 'simple forced marriage', in contrast, the individual spouses are married against their will but with the consent of their families. However, if the courts emphasise individual consent, a 'real forced marriage' is marked by the lack of consent of the individual spouses. This includes situations where one or both spouses are deemed incapable of giving genuine consent. To determine individual or familial consent, the courts have to confirm the survivor's state of mind. This unduly moves the focus of the inquiry away from the words and conduct of the perpetrator and the context in which they acted and places an emphasis on the actions or inactions of the victim. Often inappropriate, punitive questioning during investigations and at trial contributes to secondary victimisation of those the police, lawyers and courts set out to protect. Only patriarchal stereotypes of, and attitudes to, women remain safe and guarded.⁵⁷

3.2. Benefits as Proxies for Consent

Continuing in this line, in the *AFRC*⁵⁸ as well as the *RUF* case,⁵⁹ the court also deliberated whether, despite being abducted, forced into marriage and coerced to perform sexual and other services for their forced husbands and the fighting group, forced wives benefitted from the forced marriage because they received protection, food and access to looted goods and consequently might not have attempted to escape and in some cases stayed with their forced husband even after the conflict had ended.

The Defence teams in *RUF*⁶⁰ and *Al Hassan*⁶¹ appeared to suggest that the relative benefits forced wives or their families received from their forced husband in the form of protection and access to resources during their forced marriage or as a payment of a sum of money at the outset signified their consent to the marriage. Furthermore, by accepting those alleged benefits, forced wives arguably demonstrated tactical agency under coercive circumstances. Consequently, they are not seen as 'real victims'.⁶² As demonstrated above, consent of 'simple

⁵⁷ Andrias (n 1); Estrich (n 1); Dowds (n 2).

⁵⁸ *AFRC*, 'Prosecution Filing of Expert Report' (n 12); *AFRC*, 'Trial Judgment' (n 16) paras 1157, 1161; *AFRC*, 'Trial Judgment' (n 16) Judge Doherty's Partly Dissenting Opinion paras 48-49.

⁵⁹ *RUF*, 'Trial Transcript' (n 11); *RUF*, 'Trial Judgment' (n 11) para 1413.

⁶⁰ *ibid.*

⁶¹ *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 42.

⁶² Williams (n 1); Andrias (n 1); Du Mont, Miller and Myhr (n 1); Dowds (n 2).

victims' who act strategically to improve their situation would lead to the classification of these forced marriages as 'simple' rather than 'real forced marriages'.

In the *RUF* case, the SCSL considered situations where women were forced into marriage and subsequently gained access to resources and protection from their forced husband. Some forced wives also stayed with their forced husband after the conflict had ended, often out of socio-economic necessity.⁶³ The Defence appeared to suggest that an initially forced marriage can become consensual through even a coerced exchange of goods and services that arguably could take on the form of mutual conjugal obligations in the form of loyalty and the provision of sexual, reproductive, domestic and support services of the wife in exchange for the protection and provision of material resources by the husband.⁶⁴ As demonstrated above, an element of consent, possibly even reluctant agreement or survival consent given under highly coercive circumstances, transforms a conflict-related forced marriage from a 'real' into a 'simple forced marriage'. Importantly however, following this interpretation would reverse the understanding that coercive circumstances make genuine consent impossible.⁶⁵ It would also dispute the court's previous determination in the *AFRC* case. Here, the SCSL found that any reluctant agreement given or any benefit received during the forced marriage does not vitiate the criminal nature of the initial action of forcing a person into marriage.⁶⁶ Following this, situations where forced wives receive a relative benefit from their forced husband or through their forced marriage are still categorised as a 'real forced marriage'. Similarly, the court also stated that forced wives holding positions of respect, wives of commanders and Mammy Queens for example, does not detract from having been coerced into a 'real forced marriage'.⁶⁷ The ICC's decision on questions of consent and culpability in the case against Dominic Ongwen might prove illuminating in this debate. Ongwen was abducted and made a child soldier and was therefore initially forced into the LRA. Eventually, however, he became a commander of the group and allegedly chose to participate in their criminal

⁶³ *AFRC*, 'Decision on Prosecution Request for Leave' (n 25); *RUF*, 'Trial Transcript' (n 11); *RUF*, 'Trial Judgment' (n 11) para 1413; Coulter (n 6); Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone' (n 17).

⁶⁴ *RUF*, 'Trial Transcript' (n 11); *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Trial Transcript) SCSL-2004-15-T 'RUF Case' (3 May 2007); *RUF*, 'Trial Judgment' (n 11) para 1413.

⁶⁵ ICC, 'Rules of Procedure and Evidence' (September 2002) UN Doc ICC-ASP/1/3 Rule 70; SCSL, 'Rules of Procedure and Evidence' (31 May 2012) Rule 96; International Criminal Tribunal for Rwanda (ICTR), 'Rules of Procedure and Evidence' (13 May 2015) ITR/3/REV.24 Rule 96; International Criminal Tribunal for the Former Yugoslavia (ICTY), 'Rules of Procedure and Evidence' (8 July 2015) UN Doc IT/32/Rev.50 Rule 96.

⁶⁶ *AFRC*, 'Trial Judgment' (n 16) para 1081; *AFRC*, 'Appeals Chamber Judgment' (n 16) para 190.

⁶⁷ *AFRC*, 'Trial Judgment' (n 16) paras 1124, 1156; *AFRC*, 'Trial Judgment' (n 16) Judge Doherty Partly Dissenting Opinion para 41; *AFRC*, 'Appeals Chamber Judgment' (n 16) para 191.

actions⁶⁸ possibly because he was socialised into the LRA and became a victim of circumstances.⁶⁹ His participation might also have been a strategic choice and a means of survival.⁷⁰ However, Ongwen's continued active participation in the LRA and his rise in their ranks might also have been motivated by feelings of loyalty towards the group, a shared ideology and a wish to gain power, status and influence.⁷¹ Depending on the court's decision on questions of mental capacity and duress, Ongwen might be held responsible for his actions and the initial violation of his rights might be superseded by his later wilful participation in the LRA. Following this line of argument without intending to equate the experience of Dominic Ongwen with that of forced wives, women who are initially forced into a marriage and subsequently gain a relative benefit from, and therefore might be said to have consented to and wilfully participated in, the union might not be seen as 'real victims' and their experiences not categorised as 'real forced marriages', as the Defence in the *RUF* case suggests.

Additionally, the ICC might refer to the *AFRC* or *RUF* case and the SCSL's considerations of forced marriage with relative benefits in its deliberations in *Al Hassan*. Here, conflict-related forced temporary marriages in Mali included a payment of a sum of money to the bride or her family.⁷² Accepting the payment, albeit under coercion, could be interpreted as individual or familial consent to the marriage. Again, this would lead to its categorisation as a 'simple' rather than 'real forced marriage'. However, compared to conflict-related forced marriages in Sierra Leone, consent would have been given at the beginning of the marriage rather than later in its course. Taking this into account, a conservative reading by the court might not recognise acts of violence perpetrated within the marriage as crimes. However, taking into consideration the ECCC's finding that rape in the context of forced marriage amounts to another inhumane

⁶⁸ *Prosecutor v Dominic Ongwen* (Public Redacted Version of 'Corrected Version of "Defence Closing Brief"', filed on 24 February 2020) ICC-02/04-01/15 (13 March 2020) paras 11-21; E Baines, 'Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen' (July 2008) JRP Fieldnote 7; G Kan, 'The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen' (2018) 5 SOAS Law Journal 70; R Lorenzo and A Pangalangan, 'Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals' (2018) 33 American University International Law Review 605.

⁶⁹ *Prosecutor v Dominic Ongwen* (Third Public Redacted Version of 'Defence Brief for the Confirmation of Charges Hearing') ICC-02/04-01/15 (25 May 2016) paras 36-49; *Ongwen*, 'Defence Closing Brief' (n 68) para 474; Lorenzo and Pangalangan (n 68).

⁷⁰ *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 475-477; Kan (n 68).

⁷¹ *Prosecutor v Dominic Ongwen* (Public Redacted Version of the 'Corrected Version of the "Victims' Closing Brief"' filed on 24 February 2020, ICC-02/04-01/15-1721-Conf) ICC-02/04-01/15 (13 March 2019) para 304; *Ongwen*, 'Prosecution Closing Brief' (n 28) para 477.

⁷² *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 565; *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 12.

act,⁷³ it is unlikely that the ICC would go back on the progress that has been made, for example, regarding the concept of continuous consent and the criminalisation of marital rape. However, it might follow the SCSL in *Taylor*⁷⁴ and separate an ‘interrelated whole conduct’⁷⁵ into the initial act of forcing or coercing a person into a conjugal association without their consent on the one hand, and the acts of gendered physical, sexual and psychological violence perpetrated within that union on the other. This would not fully capture survivors’ experiences and the nature of forced marriage as a process and a ‘larger overarching [gendered] harm associated with [this] particular collection of [sexual and non-sexual] offences (...) that other international criminal law terms [such as sexual slavery or enslavement] do not adequately or fully capture.’⁷⁶ As the Prosecution in the *AFRC* case stressed:

Sexual slavery does not necessarily amount to forced marriage, in that a sexual slave is not necessarily obliged to pretend that she is the wife of the perpetrator. Similarly, a victim of sexual violence is not necessarily obliged to perform all the tasks attached to a marriage.⁷⁷

The label ‘marriage’ attached to this coerced, involuntary relationship marked by gender-based violence can manipulate forced spouses into loyalty towards each other or create a feeling of commitment between them. It can result in mutual obligations and long-term socio-economic dependency that extend beyond the end of the conflict. This is further influenced by traditional gender and family norms that prescribe women’s subordination and a collective lifestyle that discourages single motherhood. Moreover, it is affected by the social stigmatisation that portrays survivors of forced marriage as willing collaborators.⁷⁸ This indicates that a forced marriage is more than the sum of its parts. The totality makes it a distinct crime that cannot be adequately captured by existing categories of international crimes or in a collection of separate charges.⁷⁹ Consequently, if the ICC in *Al Hassan* follows the SCSL’s determination in *Taylor*, it would not fully address the crime of conflict-related forced marriage and its consequences. However, the Prosecutor in *Al Hassan* appeared to aim for a more just outcome when she stressed that the harm and stigmatisation that

⁷³ *Case 002*, ‘Closing Order’ (n 18) para 1545; *Case 002*, ‘Trial Judgment’ (n 9) para 3695 ff.

⁷⁴ *Taylor*, ‘Trial Judgment’ (n 16) paras 427, 429.

⁷⁵ Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone’ (n 17) 142.

⁷⁶ *ibid* 144.

⁷⁷ *AFRC*, ‘Trial Judgment’ (n 16) para 701.

⁷⁸ *AFRC*, ‘Prosecution Filing of Expert Report’ (n 12); *AFRC*, ‘Trial Judgment’ (n 16) para 711; Dauvergne and Millbank (n 21); BA Toy-Cronin, ‘What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime against Humanity’ (2010) 19 *Columbia Journal of Gender and Law* 539; Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone’ (n 17); Bunting (n 6); Stout (n 55); Aijazi and Baines (n 36); Baumeister (n 53) 69; Bunting and Ikhimiukor (n 55).

⁷⁹ Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone’ (n 17).

forced wives experience is different from, and in addition to, that resulting from sexual violence.⁸⁰ While a separate crime of forced marriage would do important work to address the injustices forced spouses have experienced in the past, categorising it as a form of slavery or enslavement to highlight the absence of consent of victims might work towards changing social perceptions of the conduct and consequently survivors' experiences in the future, serving the broader women's rights agenda.⁸¹ However, the same could be achieved by developing a fuller, less patriarchal understanding of forced marriage as the conflict-related gender-based violation of a person's autonomy that it is.

Developing the previous conclusion further, a conflict-related forced marriage is a 'simple' rather than a 'real forced marriage' if an element of consent is met, be it familial or individual consent, possibly even if given once under coercive circumstances and in exchange for a relative material or immaterial benefit.

3.3. A Lack of Resistance as Consent

In addition to questions about individual and familial consent raised by inquiries into the differences between traditional and conflict-related forced marriages and relative benefits victims receive through a forced marriage, an apparent lack of resistance could be interpreted as consent.⁸² Consequently, courts might interpret a conflict-related forced marriage as a 'simple' rather than a 'real forced marriage' if a forced wife did not attempt to escape and misplace the focus of the inquiry on the actions or inactions of the survivor rather than the words and conduct of the perpetrator. However, the SCSL, ECCC and ICC all emphasised the futility of escape as victims had nowhere to go and risked severe physical punishment and even death if they were caught.⁸³ Similarly, the courts stressed that victims were severely punished for refusing to get married or to consummate the marriage, for breaking the rules and disobedience.⁸⁴ This demonstrates that a lack of resistance, including attempts to escape,

⁸⁰ *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 15.

⁸¹ A Adams, 'Sexual Slavery: Do We Need This Crime in Addition to Enslavement' (2018) 29 Criminal Law Forum 279, 312.

⁸² *Foča*, 'Trial Judgment' (n 54); *RUF*, 'Trial Transcript' (n 11); *Estrich* (n 1); *Dowds* (n 2).

⁸³ *AFRC*, 'Prosecution Filing of Expert Report' (n 12); *RUF*, 'Trial Transcript' (n 11); *AFRC*, 'Trial Judgment' (n 16) para 709; *AFRC*, 'Trial Judgment' (n 16) Judge Doherty Partly Dissenting Opinion para 32; *RUF*, 'Trial Judgment' (n 11) paras 1293, 1407-1408, 1467; *Taylor*, 'Trial Judgment' (n 16) para 1019; *Ongwen*, 'Victims' Closing Brief' (n 71) paras 99, 213, 216, 2018, 220, 238; *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 167, 475.

⁸⁴ *AFRC*, 'Prosecution Filing of Expert Report' (n 12); *AFRC*, 'Trial Judgment' (n 16) para 1184; *AFRC*, 'Appeals Chamber Judgment' (n 16) para 191; *RUF*, 'Trial Judgment' (n 11) para 1467; *Taylor*, 'Trial Judgment' (n 16) para 1019; *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 651; *Case 002*, 'Trial Judgment' (n 9) para 3686; *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 12; *Ongwen*, 'Victims' Closing Brief' (n 71) paras 99, 213; *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 111, 118-119, 161, 167, 171.

does not indicate consent of the victims to the marriage. Rather, it highlights that forced wives and forced husbands lived in highly coercive environments that deprived them of their liberty and autonomy. In addition to the absence of consent, it is those coercive circumstances that make a conflict-related forced marriage a 'real forced marriage'.

3.4. A Coercive Environment

As discussed above, the *AFRC* and *RUF* cases before the SCSL, *Case 002* before the ECCC and the *Al Hassan* and *Ongwen* cases before the ICC suggest that an element of consent makes a conflict-related forced marriage a 'simple' rather than a 'real forced marriage'. They also stress that coercive circumstances vitiate consent.⁸⁵ Therefore, the existence of a coercive environment marks a conflict-related forced marriage as a 'real forced marriage'. Placing a focus on coercive circumstances surrounding a forced marriage has the potential to prevent an undue focus on the actions or inactions of the survivors and avoid inappropriate questioning and secondary victimisation. This highlights the importance of analysing the contextual dimension, the everyday constraints as well as the broader surrounding circumstances of a marriage. Crucially, this analysis has to go beyond an application of concepts like freedom and voluntariness that would return the focus to the survivor's state of mind, relative gains and escape routes. It is crucial to apply a broad understanding of coercive circumstances that cannot be reduced to a list of examples. An analysis of coercive circumstances must consider pre-existing as well as purposively created formal and informal power disparities that have a compelling effect on the victim and make the threat and use of force unnecessary. It also has to take into account the victim's perception of the perpetrator's power and how this impacts their ability to consent. Therefore, a broad understanding of coercive environments and circumstances better reflects the nature and impact of the acts of the perpetrator and has the potential to direct attention to their actions rather than those of the victim. The key question then becomes whether the victim could exercise their free choice and the perpetrator's awareness of and role in it.⁸⁶ This in turn would inform a better understanding of who a 'real victim' of a 'real forced marriage' is.

⁸⁵ *AFRC*, 'Trial Judgment' (n 16) paras 114, 694, 712, 745; *AFRC*, 'Trial Judgment' (n 16) Judge Doherty Partly Dissenting Opinion para 17; *AFRC*, 'Appeals Chamber Judgment' (n 16) para 191; *RUF*, 'Trial Judgment' (n 11) paras 162, 200, 1287, 1290, 1460, 1463, 1466, 1470; *Ongwen*, 'Defence Brief for the Confirmation of Charges Hearing' (n 69) para 474; *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 549; *Case 002*, 'Trial Judgment' (n 9) para 3690; *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 160-161.

⁸⁶ Dowds (n 2).

The SCSL, ECCC and ICC demonstrated a relatively broad understanding of coercion and acknowledged that it includes pre-existing as well as purposively created physical and non-physical elements. They recognised that a person can be coerced into a conflict-related forced marriage and into performing conjugal duties, for example, through threats and the use of physical or sexual violence against the victim or a third person, abduction, detention, enslavement, intimidation, duress, psychological oppression, the abuse of power and taking advantage of a coercive (conflict) environment.⁸⁷ Building on this, the courts' definitions of the crime of forced marriage moved towards the inclusion of a general element of coercion rather than a list of examples.⁸⁸ They recognised that 'forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner'.⁸⁹ This definition indicates that, in the cases discussed above, the courts arguably took a perpetrator-centric approach⁹⁰ to the assessment of coercive circumstances by focusing on the actions of the accused and of those under their command, stressing that actual and perceived power disparities between victims and perpetrators made the threat and use of direct force unnecessary and impacted victims' ability to act autonomously. However, the courts did not consider the wider coercive context of a world shaped by deep, intersecting inequalities, circumventing discussions about race, class and sexuality, amongst others.⁹¹ Arguably with the exception of *Case 002*, this led to, amongst others, a disregard of the fact that men as well as women live in coercive environments. Therefore, neither women nor men are free agents with a full capacity for action in this context. However, men have relative agency compared to women. Consequently, some men willingly participate in conflict-related forced marriages and freely

⁸⁷ *AFRC*, 'Trial Judgment' (n 16) paras 114, 233, 694, 720, 734, 745, 1078, 1081, 1093, 1184; *AFRC*, 'Trial Judgment' (n 16) Judge Doherty Partly Dissenting Opinion paras 17, 27, 46, 53; *AFRC*, 'Appeals Chamber Judgment' (n 16) paras 190-191; *RUF*, 'Trial Judgment' (n 11) paras 1287, 1290, 1408, 1463, 1467-1468; *Ongwen*, 'Defence Brief for the Confirmation of Charges Hearing' (n 69) para 474; *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 12; *Case 002*, 'Trial Judgment' (n 9) paras 682, 742, 751, 1147, 3692; *Ongwen*, 'Victims' Closing Brief' (n 71) para 101; *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 111, 118-119, 160-164.

⁸⁸ *AFRC*, 'Trial Judgment' (n 16) para 701; *AFRC*, 'Trial Judgment' (n 16) Judge Doherty Partly Dissenting Opinion para 53; *AFRC*, 'Appeals Chamber Judgment' (n 16) para 196; *RUF*, 'Trial Judgment' (n 11) paras 1293, 1295; *Case 002*, 'Closing Order' (n 18) para 1443; *Ongwen*, 'Decision on the Confirmation of Charges' (n 19) para 93; *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 599; *Ongwen*, 'Victims' Closing Brief' (n 71) para 98.

⁸⁹ *AFRC*, 'Appeals Chamber Judgment' (n 16) para 196.

⁹⁰ Women's Initiative for Gender Justice, 'Gender Report Card on the International Criminal Court 2018' (2018) 156 <https://4genderjustice.org/ftp-files/publications/Gender-Report_design-full-WEB.pdf> accessed 24 April 2020.

⁹¹ Bunting, Lawrence and Roberts (n 43) 15-17.

select wives or have wives selected for them.⁹² Some approach or pressure their superiors to give them a wife and can negotiate the choice of a wife.⁹³ Some men, however, strategically marry, for example to protect themselves and dispel rumours of actual or imagined adultery or impotence. Yet others are ordered to marry.⁹⁴ However, again with the exception of the ECCC, the courts did not question forced husbands' consent to marriage or the lack thereof and feminised conflict-related forced marriage. This indicates that they maintain a gendered victim-perpetrator dichotomy that is built on ideas of absolute freedoms. This again obscures the wider coercive circumstances and their impact on individuals and prevents consent and responsibility from being seen in a dynamic, active and relational sense.⁹⁵

3.5. Duration and Purpose

In addition to coercion and consent, the duration and purpose of a conflict-related forced marriage impact its classification as a 'real' or 'simple forced marriage'.

In *Al Hassan*, the temporary nature of forced marriages and their strategic and sexual purpose marks them as 'simple forced marriages'⁹⁶ as they were never meant to be sacrosanct unions⁹⁷ of two people that create lifelong mutual conjugal obligations.⁹⁸ However, this interpretation would ignore the long-lasting stigmatisation that ex-forced wives experience as a consequence of even temporary forced marriages that were intended as a reward for fighters, a way for them to satisfy their sexual needs, to procreate and build a new society.⁹⁹ Mirroring the above-mentioned judicial interpretation of a relative benefit as a sign of consent, community members accused ex-forced wives of marrying members of Ansar Eddine and Al Qaeda in the Islamic Maghreb for financial gain, impacting their ability to consensually marry and start a family in the future.¹⁰⁰ This demonstrates that, comparable to forced marriages in Sierra Leone,

⁹² *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 130, 135.

⁹³ *Case 002*, 'Trial Judgment' (n 9) paras 3543, 3592-3593, 3599-3602, 3623; *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 116, 131, 144-145; Aijazi and Baines (n 36) 476-477.

⁹⁴ *Case 002*, 'Trial Judgment' (n 9) paras 3539, 3620; *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 116, 131, 144-145; Ye (n 8); Aijazi and Baines (n 36) 476-477.

⁹⁵ Mkhize (n 43) 28; Bunting, Lawrence and Roberts (n 43) 15-17; Ferme (n 25) 230, 233-234; Aijazi and Baines (n 36) 465, 481-483; Adams (n 81); Adjei (n 43) 484.

⁹⁶ *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) paras 570-571.

⁹⁷ *Taylor*, 'Trial Judgment' (n 16) para 427.

⁹⁸ *AFRC*, 'Trial Judgment' (n 16) para 711.

⁹⁹ *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) paras 649, 701.

¹⁰⁰ *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) paras 15-16, 97.

Uganda and Cambodia,¹⁰¹ even temporary forced marriages do not simply end when a couple divorces or separates but have complex, long-lasting consequences.

The ICC's discussions about the purpose of a conflict-related forced marriage in *Al Hassan* could be guided by the SCSL's deliberations in the *AFRC* case¹⁰² and the submissions of the Defence in *Ongwen*.¹⁰³ Both suggest that a conflict-related forced marriage primarily for the purpose of sex is not a 'real forced marriage' and possibly not a 'simple forced marriage' either but rather a form of sexual slavery. In the *AFRC* case, the SCSL Trial Chamber found that even though at first glance there was evidence that a forced marriage also consists of non-sexual elements, it was 'not satisfied that the evidence adduced by the Prosecution was capable of establishing [these] elements (...) of "forced marriage" independent of the crime of sexual slavery'.¹⁰⁴ Building on this, the Defence in *Ongwen* understood forced marriage and forced labour involving compulsory sexual activity to be encompassed by the crime of sexual slavery.¹⁰⁵ However, considering Justice Doherty's partly dissenting opinion in the *AFRC* case,¹⁰⁶ the *RUF* case¹⁰⁷ and the decision of Pre-Trial Chamber II on the confirmation of charges in *Ongwen*,¹⁰⁸ exclusivity, at least for the forced wife, would render the forced marriage 'not predominantly a sexual crime'¹⁰⁹ and therefore a 'real forced marriage'. Here, the fact that, in Sierra Leone and Uganda, forced husbands often had more than one wife and therefore forced marriages not being exclusive unions on their part, while arguably still not being predominantly sexual, does not appear to impact their classification as 'real forced marriages'.¹¹⁰ Acknowledging the gendered sexual and non-sexual elements of conflict-related forced marriage as the basis for establishing it as an independent crime is crucial

¹⁰¹ *AFRC*, 'Prosecution Filing of Expert Report' (n 12); Allen and Schomerus (n 21); Carlson and Mazurana (n 6); Coulter (n 6); Ye (n 8).

¹⁰² *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Decision on Prosecution Request for Leave to Amend the Indictment) SCSL SLS-2004-16-PT 'AFRC Case' (6 May 2004) paras 51-52; *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Separate Concurring Opinion on the Trial Chamber's Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98) SCSL-04-16-T 'AFRC Case' (31 March 2006) para 19(iii); *AFRC*, 'Trial Judgment' (n 16) paras 704-705.

¹⁰³ *Ongwen*, 'Defence Brief for the Confirmation of Charges Hearing' (n 69) paras 128-130; *Prosecutor v Dominic Ongwen* (Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision) ICC-02/04-01/15 (29 March 2016) paras 40-44.

¹⁰⁴ *AFRC*, 'Trial Judgment' (n 16) para 704.

¹⁰⁵ *Ongwen*, 'Defence Brief for the Confirmation of Charges Hearing' (n 69) para 128; *Ongwen*, 'Defence Request for Leave' (n 103) para 41.

¹⁰⁶ *AFRC*, 'Trial Judgment' (n 16) Judge Doherty Partly Dissenting Opinion paras 50-53, 69-70.

¹⁰⁷ *RUF*, 'Trial Judgment' (n 11) paras 1351, 1472.

¹⁰⁸ *Ongwen*, 'Decision on the Confirmation of Charges' (n 19) 93.

¹⁰⁹ *AFRC*, 'Appeals Chamber Judgment' (n 16) para 195; *RUF*, 'Trial Judgment' (n 11) paras 466-467; *Ongwen*, 'Decision on the Confirmation of Charges' (n 19) para 93.

¹¹⁰ Carlson and Mazurana (n 6) 23; Coulter (n 6); Kramer (n 6) 25.

to counter myths that women primarily experience conflicts as victims of sexual violence when they are targeted because of their broader gender roles that make them not only sexual beings but (domestic) workers and caretakers as well.¹¹¹ Importantly, this has to be done without enshrining patriarchal stereotypes into law. Arguable, the label of slavery or enslavement would achieve this and additionally avoid the use of the language and acceptance of the perspective of the perpetrators that legitimises the conduct, serving the wider women's rights agenda. However, it might also mask elements of sex and gender completely.¹¹²

4. Conclusion

This article discussed the SCSL's, ECCC's and ICC's construction and reconstruction of the concepts of a 'real' and 'simple forced marriage'. An analysis of the *AFRC*, *RUF*, *Case 002*, *Ongwen* and *Al Hassan* cases suggests that indicators of a 'simple forced marriage' are:

- familial or individual consent, possibly even if given once, reluctantly, under coercive circumstances and in exchange for a relative material or immaterial benefit;
- a lack of resistance;
- temporariness;
- a predominantly sexual purpose.

Contrastingly, markers of a 'real forced marriage' are:

- pre-existing and/or purposively created physical and non-physical coercion;
- a lack of consent;
- exclusivity of the forced wife;
- a sexual and non-sexual purpose.

The courts' discussions of 'real' and 'simple forced marriages' generally indicate a focus on the words and conduct of the perpetrator. However, they built on and perpetuated biases and misconceptions related to the benign nature of tradition and familial consent, and the optionality of individual consent. This denies women agency and constructs them as passive victims. However, the courts allowed inquiries into survivors' lack of resistance and acceptance of relative benefits, tactically interpreting both as possible signs of agency and consequently consent. This in turn indicates an expectation that women have to,

¹¹¹ Stout (n 55) 23.

¹¹² Gong-Gershowitz (n 54); R Slater, 'Gender Violence or Violence against Women? The Treatment of Forced Marriage in the Special Court for Sierra Leone' (2012) 13(2) *Melbourne Journal of International Law* 732; Allain, *The Law and Slavery* (n 41) 468; Adams (n 81) 315-316, 318.

and will, fight a violation of their rights, ignoring that they might also freeze or flop under highly coercive circumstances.¹¹³ However, in neither situation does a lack of resistance amount to consent, nor does a relative gain excuse or justify the violation. As is indicated here, the courts maintained a clear and gendered victim-perpetrator dichotomy. In doing so, they neglected ideas of relational autonomy and personhood and wider coercive contexts that are shaped by deep and intersecting inequalities, complicating victim and perpetrator constructs. Drawing on the same gendered notions, the courts built on and perpetuated understandings of marriage as an exclusive, lifelong sacrosanct union between a man and a woman and took a traditional view on their respective conjugal duties. This incorporates patriarchal gender stereotypes into 'jurisprudence that (...) seeks to make gains for women'¹¹⁴ and disregards alternative forms of marriage and conjugal duties.

These biases and misconceptions highlight elements that have to be taken into consideration when developing a definition of forced marriage for the purpose of International Criminal Law. A definition must recognise that forced marriage is a process rather than an act. As such, forced marriage includes both, coercing a person into a conjugal association without their consent as well as various acts of gendered physical, sexual and psychological violence that are perpetrated within that relationship. The element of consent has to be understood broadly to allow for a context sensitive interpretation and application. Similarly, the element of coercion must be interpreted to cover the wider coercive circumstances that continuously surround a forced marriage in addition to pre-existing and purposively created physical and non-physical coercion. In this context, women and men have to be recognised as subjects and objects of forced marriage, as both victims and perpetrators. Following on from this and taking into account the different forms of forced marriage in different contexts, the acts of gendered physical, sexual and psychological violence perpetrated within a forced marriage have to be interpreted flexibly.

¹¹³ Andrias (n 1); Estrich (n 1); Dowds (n 2).

¹¹⁴ B Nowrojee, 'Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims' (2005) *Harvard Human Rights Journal* 85, 102.