

Wartime Female Slavery: Enslavement?

Patricia Viseur Sellers[†]

Introduction	115
I. Wartime Female Slavery	117
A. World War II and the “Comfort Women”	117
B. The Former Yugoslavia and the “Foca” Case	125
C. Forced Marriage in the Sierra Leone Conflict	128
II. Revisiting Female Wartime Slavery	135
Conclusion	143

Introduction

The confluence of armed conflict and enslavement¹ sired the practice of wartime female slavery.² Akin to wars that enslaved the captured enemy were wars that were dependent upon slavery systems to sustain military campaigns. Several episodes of wartime slavery, especially female slavery, have resurged in the past 100 years. During World War II, for example, the Japanese military enslaved tens of thousands of “comfort women,”³ while recent wars in Sierra Leone, Uganda, the Democratic Republic of Congo, and the former Yugoslavia revealed rampant instances of wartime female slavery.

Wartime female slavery is an arcane form of enslavement. Although modern enslavement fosters an image of mostly male chattel slaves, sexual

[†] Patricia Viseur Sellers is a Visiting Fellow at Kellogg College, Oxford University. She was the Legal Advisor for Gender Crimes and a Prosecutor at the International Criminal Tribunal for the former Yugoslavia (ICTY) from 1994-2007. The author expresses her gratitude to Professor Elizabeth Griffin, Fellow at Essex University, for her comments. Any errors are the author’s own.

1. The terms “slavery” and “enslavement” are used interchangeably, except when enslavement refers to a crime against humanity or when slavery refers to a violation of the laws and customs of war under a specified statute. The author uses the term “female slavery” to connote any enslavement endured by women and girls. See Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 356 (Mar. 15, 2002) (“The Trial Chamber is satisfied that the offence of slavery under Article 3 of the Tribunal’s Statute is the same as the offence of enslavement under Article 5. As such, slavery under Article 3 requires proof of the same elements as constitute enslavement under Article 5. Accordingly, throughout this judgment the Trial Chamber will use the term enslavement to refer to both offences.”).

2. See, e.g., 1 ORLANDO PATTERSON, FREEDOM IN THE MAKING OF WESTERN CULTURE 50-51 (1991) (noting that circa 700 B.C., the Greek city-states would capture enemy females in order to replenish the slave population that was overwhelmingly female).

3. See YUKI TANAKA, JAPAN’S COMFORT WOMEN: SEXUAL SLAVERY AND PROSTITUTION DURING WORLD WAR II AND THE US OCCUPATION 6-7 (2002); see also KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 73-75 (1997). The term “comfort women” is usually used in colloquial language to refer to the females, women and girls, who were enslaved for the purpose of providing sexual services to Japanese soldiers during World War II. This is a degrading misnomer.

slavery is readily identified as feminine. To understand the contours of female slavery as enslavement, one is obliged to reassemble fractured legal classifications. Proscribed under several crimes, an objective synthesis is difficult due to a swirl of unexamined perceptions and encumbered by tasks and statuses assigned to female slaves that recall non-wartime gender roles, which entail patriarchal constraints about the duties of females. This Article modestly offers a few observations concerning wartime female slavery, especially female sex slaves, amid that swirl.

The first section of this Article provides an overview of three incidents of wartime female slavery. It first examines the crimes committed against “comfort women.” Even though various legal instruments, such as the 1926 Slavery Convention, penalized female slavery, wartime slavery systems persisted in the twentieth century. Indeed, the failure to redress the crimes committed against “comfort women” after World War II exerted a prejudicial influence upon precepts of wartime female slavery and the understanding of enslavement. The next sub-section reviews the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which examined the wartime slavery endured by Bosnian females in the Foca region.⁴ The ICTY jurisprudence that led to convictions for enslavement only partially corrected the legal bias spurred by the World War II impunity for the slavery exacted upon “comfort women.” The final sub-section reviews relevant jurisprudence from the Special Court for Sierra Leone (SCSL)⁵ with particular reference to the cases *Prosecutor v. Brima*,⁶ the AFRC case, and *Prosecutor v. Sesay*,⁷ the RUF case. Each of these trials presented evidence of abductions, rapes, forced conjugal relations, domestic tasks and other duties imposed on females by male soldiers. None of these acts were charged as the crime of enslavement. The RUF Trial Chamber convicted the accused of sexual slavery,⁸ while the AFRC Trial Chamber declined to do so, although they did convict the accused of other crimes such as rape and murder, among others.⁹

The second section of this Article proffers an analysis of the aforementioned cases and misperceptions of wartime female slavery. It observes a confused impasse that hinders the comprehension of wartime female slavery that is enmeshed in both chattel labor and sexual abuse. The SCSL decisions that wrangled with the concept of forced marriage divided the

4. *Prosecutor v. Kunarac, Kovac & Vukovic*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001) [hereinafter Foca TJ]; *Prosecutor v. Kunarac, Kovac & Vukovic*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment (June 12, 2002) [hereinafter Foca AJ].

5. Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter SCSL Statute].

6. *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-T, Judgment (June 20, 2007) [hereinafter AFRC TJ]; *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-A, Appeals Chamber Judgment (Feb. 22, 2008) [hereinafter AFRC AJ].

7. *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Judgment (Mar. 2, 2009) [hereinafter RUF TJ]; *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-A, Appeals Chamber Judgment (Oct. 26, 2009) [hereinafter RUF AJ].

8. RUF TJ, *supra* note 7, § IX-1 count 7, § IX-2 count 7 and § IX-3 count 7.

9. AFRC TJ, *supra* note 6, ¶¶ 2116, 2120, 2123.

sexual and non-sexual acts of forced marriage. These decisions “fit” the criminal conduct under the enumerated crimes of sexual slavery and inhumane acts. However, this persistent wartime sexual abuse of female slaves that deprives them of the fuller designation as “subjects of enslavement” warrants analysis. Finally, it is suggested that this impasse stems from our discomfort or inability to hold the gaze of female slaves.

I. Wartime Female Slavery

A. World War II and the “Comfort Women”

During World War II, the Japanese military fortified its might with a system of slavery. The enslavement of well over 100,000 females was integral to the military strategy of the Japanese.¹⁰ The moniker “comfort women” belies the brutality of the conduct in question. Simply put, Japan boosted the mental and physical health of its fighting troops by supplying recreational sex provided by female slaves.¹¹

In administering this slavery system, the Japanese authorities did not attempt to disguise its vital use as a military tactic.¹² Enslaving the “comfort women” allowed for the routine medical examination of the female slaves and the soldiers, which guarded against the transmission of crippling sexual diseases that could have lowered the fighting ability of the Japanese soldiers.¹³ Also, the enslavement of women removed or, at least, decreased threats of espionage and potential leaks about military operations and tactics.¹⁴ Among other rationales, the military officials believed that the availability of female slaves prevented the invading Japanese soldiers from raping girls and women in occupied territories.¹⁵ Thus, the embedded “comfort women” were seen as embodying several military advantages.

After World War II, Japanese military operations ceased, and yet no proclamation of freedom was issued for the enslaved females. When the Japanese army retreated, the women and girls held in slavery were often not released nor transported back to their countries, but rather they were simply left behind.¹⁶ In Japan, the comfort women’s plight as a female wartime slavery system was denied. When Japan finally conceded the women’s plight, it instead labeled the women as prostitutes who had volun-

10. See generally Women’s International War Crimes Tribunal, Case No. PT-2000-1-T, Judgment (Dec. 4, 2001); available at <http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/Judgement.pdf>; YOSHIKI YOSHIMI, COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II 42-87 (Suzanne O’Brien trans., 2000).

11. YOSHIMI, *supra* note 10, at 72-74.

12. See, e.g., *id.* at 57-65 (discussing the documents issued by the military and government in connection with the establishment of “comfort homes” in Northern China).

13. See *id.* at 68-72.

14. See *id.* at 74-75.

15. See *id.* at 65-66.

16. See Cheah Wui Ling, *Walking the Long Road in Solidarity and Hope: A Case Study of the “Comfort Women” Movement’s Deployment of Human Rights Discourse*, 22 HARV. HUM. RTS. J. 63, 69 (2009); see also YOSHIMI, *supra* note 10, at 192-93.

teered their services as a part of the war effort.¹⁷ The legitimacy of the slavery system was feigned. Wartime slave raiding, slave trading, and female enslavement were shrouded in deceptive and culturally accepted deniability: the “comfort women” were merely patriotic prostitutes. Astonishingly, the trial of major Axis leaders, heard by the International Military Tribunal for the Far East (Tokyo Tribunal or IMTFE),¹⁸ was bereft of any evidence of the enslavement of over a 100,000 Burmese, Indonesian, Chinese, Japanese, Korean, Taiwanese, and Filipino “comfort women.”¹⁹ The Tokyo Charter should have led to multiple convictions for war crimes and crimes against humanity perpetuated against the “comfort women.” For example, charges including rape, imprisonment, deportation for labor, murder, inhumane treatment, torture, and enslavement could have been pursued.²⁰

However, to their unsung credit, the prosecutors of the Tokyo Tribunal resolutely indicted individuals for other sexual crimes, including the rapes and sexual assaults of female prisoners of war, as well as male and female occupied inhabitants.²¹ During the Tribunal’s opening statements, the prosecutors also condemned the rapes committed when the Japanese conquered Nanking.²² The judges of the Tokyo Tribunal convicted the defendants for their participation in a plethora of extreme sexual misconduct, basing their factual findings on luridly described rapes, sexual torture, sexual mutilations, and forced sexual intercourse between men and women.²³ The Tokyo Judgment provides a vivid factual record which details incidents of sexual violence that the Tokyo Tribunal classified as war crimes.

Nevertheless, the Tokyo Tribunal invoked applicable international humanitarian law to condemn *other* manifestations of wartime slavery.²⁴ Rooted in counts 54 and 55 of the indictment were allegations of a brutal

17. See Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 46 MCGILL L.J. 217, 223 (2000).

18. Charter of the International Military Tribunal for the Far East, art. 1, Jan. 19, 1946, T.I.A.S. No. 1589 (establishing a tribunal “for the just and prompt trial and punishment of the major war criminals in the Far East.”) [hereinafter Tokyo Charter].

19. See generally THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPT OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (R. John Pritchard & Sonia M. Zaide eds., 1981).

20. See generally Tokyo Charter, *supra* note 18, arts. 5(b)-(c).

21. U.S. DEP’T OF STATE, PUB. NO. 2613, FAR EASTERN SERIES NO. 12, TRIAL OF JAPANESE WAR CRIMINALS 93-94 (1946) [hereinafter TRIAL OF JAPANESE WAR CRIMINALS].

22. See *id.* at 23.

23. See 1 THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 389, 407, 409 (B.V.A. Röling & C.F. Rüter, eds., 1977) [hereinafter THE TOKYO JUDGMENT].

24. For example, the Tokyo Tribunal utilized the Regulations of The Hague Convention IV to condemn the Japanese treatment of prisoners of war. See, e.g., *id.* at 48 (“[A]lthough [Japan] might utilize the labor of prisoners of war, officers excepted, the task would not be excessive and would not be connected with the operation of war; and that she would pay to the prisoners compensation for all work done by them.”). Furthermore, the judges found that “Japan had claimed a place among the civilized communities of the world,” as expressed by the treaties Japan had ratified prior to the war, and thus “had voluntarily incurred . . . obligations designed to further the cause of peace, to outlaw aggressive war, and to mitigate the horrors of war.” *Id.* at 52.

slave labor system²⁵ that encompassed prisoners of war, civilian internees, and occupied inhabitants “conscripted” by way of false promises or threats of forcible hard labor.²⁶ These other manifestations of chattel or forced labor slavery resulted in the convictions of several defendants including General Shunroku Hata, Commander-in-Chief Heitaro Kimura, Foreign Minister Mamoru Shigemitsu, and War Minister Hideki Tojo. The IMTFE held that these defendants played a part in Japan’s notorious slave labor policies and practices.²⁷ These condemnations recall the Nuremberg convictions of Nazi defendant Martin Bormann for war crimes and crimes against humanity, which were handed down for Bormann’s participation in the slave labor program that serviced German industry and agriculture during World War II.²⁸

The slave system which was the focus of the Tokyo Tribunal revolved around the Japanese military’s inhumane treatment of civilian internees and prisoners of war who were made to perform a wretched, physical, non-sexual, overwhelmingly masculine version of slave labor. In Chapter VIII of the Tokyo Judgment, discussing the atrocities of the war crimes, the Tokyo Tribunal’s factual findings concluded that:

Having decided upon a policy of employing prisoner of war and civilian internees on work directly contributing to the prosecution of war, and having established a system to carry that policy into execution, the Japanese went further and supplemented this source of manpower by recruiting laborers from the native population of the occupied territories. This recruiting of laborers was accomplished by false promises, and by force. After being recruited, the laborers were transported to and confined in camps. Little or no distinction appears to have been made between these conscripted laborers on the one hand and prisoners of war and civilian internees on the other hand. They were all regarded as slave laborers to be used to the limit of their endurance.²⁹

Conversely, although the judges noted that the Japanese military “recruited women labour on the pretext of establishing factories” and “forced the women thus recruited into prostitution with Japanese troops,” the judges did not view the establishment of such brothels as a form of

25. TRIAL OF JAPANESE WAR CRIMINALS, *supra* note 21, at 93-96.

26. See THE TOKYO JUDGMENT, *supra* note 23, at 416-417.

27. *Id.* at 445-46, 451-52, 457-58, 461-63.

28. The London Charter governed the law and procedure of the International Military Tribunal, held in Nuremberg, which tried the major Nazi war criminals. Article 6(b), defining “war crimes,” prohibited the deportation of members of the civilian population for slave labor or for any other purpose, while article 6(c), defining “crimes against humanity,” prohibited enslavement. See Charter of the International Military Tribunal, Annexed to the London Agreement, Aug. 8, 1945, art. 6, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288. Under these provisions, the Nuremberg Judgment found defendant Bormann guilty for his prominence in the wartime slave labor program, including, *inter alia*, his supervision of slave labor matters and exercise of control over 500,000 female domestic workers transferred from the East to Germany. See 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG 340-41 (1947).

29. TOKYO JUDGMENT, *supra* note 23, at 416.

slavery.³⁰ The prosecutors failed to present to the judges any evidence of the relentless sexual acts that characterized the “comfort women’s” feminine slavery. All prosecutors adhered to the societal gender roles that spurred the rationale of patriotic prostitutes.³¹ Undoubtedly, military appeasement about the sexual aspects of this female slavery likely delimited the recognition of their subjugation as true enslavement. The prosecutors of the Tokyo Tribunal also failed to pursue the non-sexual evidence of abductions, displacement, forceful and deceptive recruitment, and subjection to mental harm endured by the “comfort women.”³² The prosecution did not fashion merited comparisons between the female slaves and the male slaves. The male slaves, who were subjected to more readily identified slave practices, were recognized by the Tokyo Tribunal as the victims of notorious war crimes, including slavery. For the “comfort women,” their slavery neither prompted investigation nor became the subject of deliberation.

The Tokyo Tribunal’s failure to condemn the subjugation of “comfort women,” under either applicable humanitarian law or international criminal law that was enforceable under the Tokyo Charter, marks a significant legal error.³³ The unwillingness of the Allied prosecutors and the Tokyo Tribunal to examine the crimes committed against the “comfort women” cannot be attributed to any squeamishness with respect to the presentation of sexual assault evidence.³⁴ On the contrary, it stemmed from the view that war crimes of slavery only addressed forced, industrial, agricultural, construction, or manual labor.³⁵ In other words, the Tokyo Judgment reinforced perceptions of enslavement as non-sexual, labor-intensive toil. Female sexual slavery during wartime simply did not resemble the accepted rubric of chattel enslavement, which is most often reserved for prisoners of war or civilian internees.

Unfortunately, the Tokyo Tribunal did not explore the applicability of Article 5(c), defining crimes against humanity under the Tokyo Charter, as a provision that might address the enslavement of the “comfort women.”³⁶ Future ICTY jurisprudence on crimes against humanity would confirm

30. *Id.* at 392-93 (discussing the atrocities committed by the Japanese when they occupied Kweilin, China).

31. Tanaka, *supra* note 3, at 87. Tanaka also advances the argument that racism, as well as gender, inhibited closer investigation by the IMTFE of the crimes committed against the “comfort women.” *Id.* at 84-87.

32. See ASKIN, *supra* note 3, at 73 n.255.

33. See, e.g., THE TOKYO JUDGMENT, *supra* note 23, at 48-52 (enumerating the Fourth Hague Convention, Geneva Prisoner of War Convention, Geneva Red Cross Convention, and Tenth Hague Convention as examples of the humanitarian law that governed the Tokyo Tribunal).

34. See, e.g., *id.* at 389 (“Even girls of tender years and old women were raped in large numbers . . . and many cases of abnormal and sadistic behavior in connection with these rapings occurred. Many women were killed after the act and their bodies mutilated.”).

35. See, e.g., *id.* at 48-49 (describing applicable humanitarian law, which viewed the dangers of wartime slavery as primarily encompassing the abuse of prisoners of war).

36. See Tokyo Charter, *supra* note 18, art. 5(c); see also Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 202 (1997).

that crimes against humanity were not solely dependent upon The Hague or Geneva positive humanitarian law.³⁷ The Tokyo Tribunal could have also utilized, either directly or by analogy, several contemporaneous international criminal law treaties to judge the Japanese wartime conduct, most notably the International Agreement for the Suppression of the “White Slave Traffic;”³⁸ the International Convention for the Suppression of the White Slave Traffic;³⁹ the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (1926 Slavery Convention);⁴⁰ and finally, the International Convention for the Suppression of the Traffic in Women of Full Age.⁴¹ These international criminal law treaties embodied proscriptions against slave trading,⁴² and like international humanitarian law, were available in the legal toolbox that the Charter provided to the prosecutors and judges of the Tokyo Tribunal. Though cloaked in the racist epithet, “White Slavery”, these instruments do address the procurement of women—by fraud or other means—for forced prostitution.⁴³ Today, this set of crimes is commonly called “human trafficking.”⁴⁴

The most significant legal instrument was the 1926 Slavery Convention. It prohibits two constitutive acts: first, “slave trade” that is, the act of reducing a person into slavery; and second, the act of “slavery,” namely, exercising any or all of the powers attaching to the rights of ownership over a person.⁴⁵ Though Japan was not a signatory to the 1926 Slavery Conven-

37. See Statute of the International Tribunal for the Former Yugoslavia, art. 5(c), May 25, 1993, 32 I.L.M. 1192 (enumerating enslavement as a crime against humanity) [hereinafter ICTY Statute].

38. International Agreement for the Suppression of the “White Slave Traffic,” May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83. Article 1 of the treaty prohibits “the procuring of women or girls for immoral purposes abroad.”

39. International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20. As a protocol to the 1904 International Agreement for the Suppression of the “White Slave Traffic,” the provisions of the convention recognized that the contracting governments could punish offenses analogous to the procurement of women or girls even where there was no exercise of fraud or compulsion. See *id.* art. 1.

40. The Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 [hereinafter 1926 Slavery Convention].

41. International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

42. The author prefers the term “slave trade” to that of “trafficking” for its congruency with the 1926 Slavery Convention, which also utilizes the term “slave trade.”

43. See, e.g., International Convention for the Suppression of the Traffic in Women of Full Age, *supra* note 41, art. 1 (“Whoever, in order to gratify the passions of another person, has procured, enticed or led away, even with her consent, a woman or girl of full age for immoral purposes to be carried out in another country, shall be punished . . .”).

44. See generally U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2010) (“Over the past 15 years, ‘trafficking in persons’ or ‘human trafficking’ have been used as umbrella terms for activities involved when one person obtains or holds another person in compelled service.”).

45. The 1926 Slavery Convention states in Article 1:

For the purpose of the present Convention, the following definitions are agreed upon:

tion, by the 1930's the Slavery Convention had attained the status of customary law.⁴⁶

The 1926 Slavery Convention is largely regarded as an instrument whose object and purpose is to abolish chattel slavery.⁴⁷ It is understood to have reinforced the international community's abolition of eighteenth and nineteenth century slave practices, which were informed by, if not rooted in, the notion of chattel slavery as practiced in the Americas and the Caribbean.⁴⁸ However, it is posited that, when fully grasped, the 1926 Slavery Convention's view of enslavement proscribes sexual slavery as well as any other actions whereby a master could exercise powers attaching to the right of ownership over a person.

In polite circles, as a result of imperfect knowledge and understanding, masculine slavery was not generally viewed as entailing sexual subjugation. This is a blind vision of history and a distortion of real events. African-American males under American slavery, for example, were also sexual slaves. Male slaves did not enjoy sexual autonomy, nor did they control their own reproduction any more than African-American female slaves.⁴⁹ Male slaves were forced to breed with female slaves to increase

-
- (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
 - (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

1926 Slavery Convention, *supra* note 40, art. 1. Article 2 places parties under an obligation:

- (a) To prevent and suppress the slave trade;
- (b) To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.

Id. art. 2.

46. See, e.g., M. Cherif Bassiouni, *Enslavement*, in 1 INTERNATIONAL CRIMINAL LAW 663, 663-704 (M. Cherif Bassiouni ed., 2d ed. 1999).

47. For a discussion about the preparatory works and the definition of slavery in the 1926 Slavery Convention, see generally Jean Allain, *The Definition of Slavery in International Law*, 52 HOW. L.J. 239, 244-51 (2009).

48. Cf. Lukas Knott, UNOCAL Revisited: On the Difference Between Slavery and Forced Labor in International Law, 28 WIS. INT'L L.J. 201, 214-16 (2010).

49. The full story of slave breeding in the United States remains untold. In a seminal series of interviews of former slaves recorded by the Works Project Administration, former males slaves offered recollections of having been used as breeder slaves:

JACOB MANSON: A lot of de slaveowners had certain strong healthy slave men to serve [service] de slave women. Generally, dey give one man four women an' dat man better not have nuttin' to do wid de udder women an' de women better not have nuttin' to do wid udder men.

...
ZENO JOHN: When de marsters see a good big nigger, sometime dey buy him for a breeder. My daddy was much of a man, yes, sir."

...
ELIGE DAVISON: Massa, he bring some more women to see me. He wouldn't let me have jus' one woman. I have 'bout fifteen and I don't know how many chillen.

their owners' wealth or they were loaned out as studs to other slave owners.⁵⁰ Correspondingly, female slaves were forced to copulate with designated male breeders, as well as with their male owners, and to bear any resulting children who were thus born enslaved.⁵¹ Additionally, female slave duties included wet nursing or breast-feeding any child, enslaved or free, white or black, as ordered by their masters.⁵² Indeed, female slaves no more owned their breast milk than male slaves owned their semen. Throughout the period of American slavery, the sexual enslavement of males and females was an established exercise of the powers attaching to the rights of ownership similar to the exercise of such powers over Greek female⁵³ and male⁵⁴ slaves who were either domestic concubines or re-sold into the sexualized slave trade.

The 1926 Slavery Convention undeniably abolishes male slavery, including the sexual ownership aspects of it. Significantly, the Convention does not prohibit slavery by gender.⁵⁵ Furthermore, it does not delineate any *sine qua non*, or specific task or purpose for which one is a slave.⁵⁶ Thus, female slaves and their experiences must be considered as fully protected under the 1926 Slavery Convention.

The foregoing bundle of anti-slavery instruments confirms that the proscription of female slavery is germane to both conceptualizing slavery and its eradication. Ironically, there probably exists no greater body of post-war proscriptions on slavery than those designed to suppress, punish, and eradicate female enslavement.⁵⁷ During this time, slave trading and

4 DONNA WYANT HOWELL, *I WAS A SLAVE: TRUE LIFE STORIES DICTATED BY FORMER SLAVES IN THE 1930's* 11-12 (1996).

50. *Id.* at 18-19.

51. *See id.* at 13-17.

52. *See, e.g., id.* at 26 (recounting the memories of former slave, Jephtha Choice, who recalled that her grandmother would breastfeed the children of her master until they were three years old).

53. Describing the acquisition and function of female slaves, Orlando Patterson noted that:

Slaves existed in number; they were property, disposable at will. More precisely, there were *slave women*, for wars and raids were the main source of supply, and there was little ground, economic or moral, for sparing the lives of the defeated men. The heroes as a rule killed the males and carried off the females, regardless of rank.

PATTERSON, *supra* note 2, at 50-51 (quoting M.I. FINLEY, *THE WORLD OF ODYSSEUS* 61 (1971)). Patterson also notes that the slave women were brought to Greece and often used as concubines. *Id.* at 51.

54. Orlando Patterson observed that males slaves were also subjected to sexual slavery, or used as male concubines:

A beautiful young boy slave who came close to the Greek physical ideal would almost certainly end up as the homosexual lover of his master. Physically attractive women and less "virginal" but still pretty boys ran a far greater risk than their less handsome counterparts of being forced into the lucrative prostitution trade in which many Greek . . . masters engaged.

ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 177 (1982).

55. *See* 1926 Slavery Convention, *supra* note 40, art. 1.

56. *See id.*

57. Less than a decade after the cessation of the armed conflict in Europe and Asia, the international community drafted further international criminal law instruments to

slavery came to enjoy legal statuses not only as war crimes or as prohibitions within international criminal treaties, but also as customary law and *jus cogens* norms.⁵⁸ Thus, several international treaties now recognize that prohibitions on slavery and slave trading are non-derogable during war or peace.⁵⁹ Contemplating these legal principles jointly underscores the international community's intent to outlaw all forms of slavery, and in particular, female slavery. Nonetheless, a common misunderstanding persists—that chattel, or labor-intensive slavery, and sexual slavery are mutually exclusive.⁶⁰

The post-World War II legal instruments aimed at penalizing female slavery duplicitously diluted and injected confusion into the meaning of slavery and enslavement, preventing the explicit identification of all forms of female enslavement as the 1926 Slavery Convention had intended. For example, the 1957 Supplementary Convention refers to “institutions and practices similar to slavery,”⁶¹ rather than solely incorporating the word “slavery” or the term, “trafficking.” This treatment renders its prohibition linguistically weaker and legally porous. Females, both women and girls, who are transferred, inherited, or delivered into situations that the Supplementary Convention sought to abolish are nothing less than enslaved persons. The Supplementary Convention's “institutions and practices” language importantly illuminates some of the gendered experiences of female slavery, and yet female slaves are imagined to only be like or similar

forbid forms of female slavery and slavery-like conditions, including sexual slavery. See, e.g., Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sep. 7, 1956, 226 U.N.T.S. 3 [hereinafter 1957 Supplementary Convention].

58. See *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (singling out slavery, genocide, and racial discrimination as violations of peremptory norms that states have a duty to refrain from during times of both war and peace).

59. See, e.g., 1926 Slavery Convention, *supra* note 40, art. 3 (providing that states may not derogate from the Covenant's obligations, which proscribe slavery).

60. See discussion *infra*, Section II.

61. The 1957 Supplementary Convention sought to abolish, *inter alia*:

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

1957 Supplementary Convention, *supra* note 57, art. 1; see also, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) [hereinafter Trafficking Protocol].

to any other enslaved person. However, viewing them as similar to a manifestation of enslavement, rather than an actual instance of it, is misleading. Anyone subject to trafficking, but especially women and children, could conceivably gain enhanced legal protection if the relevant treaties would utilize more appropriate phraseology than terms such as “persons” or “victims” of slave traders.⁶² Trafficking should be definitively viewed by the same rubric of slave trading that was outlawed by the 1926 Slavery Convention.

B. The Former Yugoslavia and the “*Foca*” Case

The first international criminal case that led to a conviction for enslavement as a crime against humanity was the *Foca* case, which was tried before the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁶³ In the *Foca* case, prosecutors of the ICTY alleged that Bosnian Serb military leaders were responsible for the detention, relentless rape, and sexual torture of Bosnian Muslim females in the Bosnian municipality of Foca.⁶⁴ Indeed, certain Bosnian Serb soldiers went so far as to enslave some of the victims.⁶⁵

The ICTY statute allows for the prosecution of conduct amounting to slavery under Article 5(c), which identifies enslavement as a crime against humanity.⁶⁶ The multiple patterns of conduct, including the reduction of females into slavery by their trade, transfer, or exchange by individual Bosnian Serb soldiers, and other acts, such as psychological control and relentless sexual abuse, manifested the status of the females as slaves, and were prosecuted under Article 5(c) as enslavement.⁶⁷ Importantly, the Trial Chamber found that Article 5(c) enslavement covered sexual and non-sex-

62. Article 3 of the Trafficking Protocol sets out that:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Trafficking Protocol, *supra* note 61.

63. *Foca* TJ, *supra* note 4; see also ICTY Statute, *supra* note 37, art. 1 (establishing an international tribunal for the prosecution of persons responsible for violations of international human rights law in the former Yugoslavia).

64. See, e.g., *Foca* TJ, *supra* note 4, ¶ 583 (“[T]he accused Dragoljub Kunarac removed many Muslim girls from various detention centres and kept some of them for various periods of time for him or his soldiers to rape.”).

65. See *id.* ¶ 728.

66. Article 3 provides the ICTY with jurisdiction over slavery as a violation of the laws and customs of war. See *supra* note 37, art. 3. However, this provision was not used in the *Foca* case. The abovementioned factual bases in *Foca* were charged under several enumerations of Article 5(c), including enslavement as a crime against humanity. See *Foca* AJ, *supra* note 4, ¶¶ 5, 11, 32 (upholding Mr. Kunarac’s and Mr. Kovac’s convictions of enslavement as a crime against humanity).

67. See *Foca* TJ, *supra* note 4, ¶ 543.

ual acts of power attaching to ownership exercised over the females, such as physical and mental control.⁶⁸

The *Foca* prosecutor and the Trial Chamber could have prosecuted these acts of sexual violence only as other enumerated crimes against humanity such as rape, torture, or inhumane acts. However, the factual bases of enslavement—detention, physical control, forced housework, exchanges among perpetrators, psychological control, social alienation, and complete sexual access controlled by the perpetrators—accurately lent themselves to the legal characterization of enslavement as a crime against humanity.⁶⁹ The state of enslavement best described and captured the reality and the entirety of the plight of the *Foca* females. Additionally, the *Foca* Trial Chamber convicted the accused for rapes and acts of sexual torture as crimes against humanity, which occurred prior to and within the context of enslavement.⁷⁰

The *Foca* Appeals Chamber upheld the Trial Chamber's convictions and reasoned "that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as 'chattel slavery,' has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership."⁷¹ It further noted that the powers of ownership exercised in *Foca* varied only by degree from those present in chattel slavery.⁷²

Prosecutor v. Krnojelac, the companion case to *Foca*, concerned male Bosnian Muslim prisoners.⁷³ It likewise included charges of enslavement as a crime against humanity based entirely upon non-sexual evidence.⁷⁴ The prosecution also charged the defendants with the war crime of slavery. The acts which were examined in *Krnojelac* were principally related to forced labor and mental anguish,⁷⁵ similar in some aspects to the forced labor conduct examined in the Tokyo Judgment and to the facts of the *AFRC* and *RUF* cases, which will be discussed later in this Article. The Trial Chamber in *Krnojelac* acquitted the accused of the enslavement and slavery charges due to inadequate evidence.⁷⁶ Although the *Krnojelac* charge of slavery as a violation of the laws and customs of war was not alleged in the *Foca* case, both cases alleged enslavement as an enumerated crime against humanity and examined the provision under the definition

68. See *id.* ¶¶ 539-43 (defining enslavement as a crime against humanity).

69. Interestingly, the Statute of the ICTY did not enumerate sexual slavery or slavery under the crimes against humanity provision. See ICTY Statute, *supra* note 37, art. 5.

70. *Foca* TJ, *supra* note 4, ¶¶ 653-56 (finding the accused, Kunarac, guilty of rape and sexual torture in the instances of FWS-75 and D.B., two Bosnian Muslim females who were detained and raped repeatedly).

71. *Foca* AJ, *supra* note 4, ¶ 117.

72. The Appeals Chamber opined that in the *Foca* case there is some destruction of the juridical personality; however, the destruction is greater in the case of "chattel slavery." *Id.*

73. Case No. IT-97-25-T, Judgment (Mar. 15, 2002) [hereinafter *Krnojelac* TJ]; Prosecutor v. *Krnojelac*, Case No. IT-97-25-A, Appeals Chamber Judgment (Sep. 17, 2003).

74. See *Krnojelac* TJ, *supra* note 73, ¶¶ 10, 357.

75. See *id.* ¶ 357.

76. See *id.* ¶¶ 426-30.

of the 1926 Slavery Convention.⁷⁷ The failure to also charge slavery as a war crime in the *Foca* case could, at least in part, be due to the Tokyo Tribunal's failure to judicially examine female sexual slavery as a war crime.

Hypothetically, the illicit conduct in *Foca* might have been indicted under a sexual slavery charge and not enslavement, if such a crime had been enumerated in the ICTY Statute. More recent statutory drafting might well have preempted the original indictment. However, it is advanced that the detailed complex criminal conduct resulting in the female slavery allegations in the *Foca* case would have been restrained if legally classified solely as sexual slavery.⁷⁸ While components of this criminal conduct of enslavement also resulted in convictions for inhumane acts, including rape and torture, the bundle of criminal acts are best characterized, in this case, as enslavement.

In the face of post-war instruments that favored the rubrics of trafficking and slavery-like practices, the *Foca* judges carefully resurrected the concept of wartime female enslavement,⁷⁹ and quite rightly included sexual violence and other non-sexual sanctioned conduct in its definition.⁸⁰ To that end, the Trial Chamber relied upon a factually inclusive interpretation of the 1926 Slavery Convention⁸¹ and customary international law.⁸² It held that the *actus reus* of enslavement consisted of the exercise of any or all of the powers that attach to the right of ownership over a person and that the *mens rea* consisted of the intentional exercise of such powers.⁸³ The *Foca* and *Krnojelac* cases evidenced a certain type of legal parity when deliberating upon two different manifestations of wartime slavery as governed by the same provision of enslavement as a crime against humanity.⁸⁴ The ICTY could have neared complete legal parity if the war crime of slavery had also been alleged and adjudicated for the crimes committed against the *Foca* females.

77. See *id.* ¶ 358 (“To establish the allegation that detainees were forced to work and that the labour detainees performed constituted a form of enslavement, the Prosecution must establish that the Accused . . . forced the detainees to work, that he . . . exercised any or all of the powers attaching to the right of ownership over them, and that he . . . exercised those powers intentionally.”); *Foca* TJ, *supra* note 4, ¶¶ 518–539 (discussing the major treaties and cases, which have defined the term “enslavement,” and adopting the definition promulgated under the 1926 Slavery Convention).

78. See *infra* Section II.

79. See *Foca* TJ, *supra* note 4, ¶¶ 515–38.

80. The Trial Chamber listed acts that proved the exercise of the rights of ownership as comprising “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.” *Id.* ¶ 543.

81. 1926 Slavery Convention, *supra* note 40, art. 1(2); *Foca* TJ, *supra* note 4, ¶ 519.

82. *Foca* TJ, *supra* note 4, ¶¶ 520–43.

83. *Id.* ¶ 540.

84. See ICTY Statute, *supra* note 37, art. 5(c).

C. Forced Marriage in the Sierra Leone Conflict

In the first case before the Special Court for Sierra Leone (SCSL), commonly called the AFRC case, the prosecution accused three defendants, each militia members of the Armed Forces Revolutionary Council, of crimes committed during the prolonged armed conflict in Sierra Leone.⁸⁵ Female slavery was a prominent issue in the case. Under Article 2 of the SCSL Statute, the prosecution charged the defendants with crimes against humanity for murder, extermination, enslavement, rape, sexual slavery, other forms of sexual violence, and other inhumane acts.⁸⁶ Next, under Article 3, it charged the war crimes of terrorism, collective punishments, violence to life, health and physical or mental wellbeing of persons, outrages upon personal dignity, and pillage against the defendants.⁸⁷ Finally, under Article 4 of the SCSL Statute, it indicted the defendants for the war crime of “conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.”⁸⁸ The AFRC case was beset with legal disputes and factual contentions with respect to conduct that is best described as female slavery.

Witnesses in the AFRC case gave explicit evidence about public rapes, sexual mutilations, countless sexual threats, and other forms of sexual abuse perpetrated by members of the AFRC.⁸⁹ Testimony of the witnesses recounted abductions of young women and girl-child soldiers by rebels who compelled them to become bush wives. For example, Witness TFI-209 testified that:

[C]aptured civilians, including herself, were taken “to town” where the witness indicated that she was then held by two persons she named as ‘Jabie’ and ‘Allusein’. The Witness testified that the person who captured her took her to a house where the witness cooked and laundered for him. The witness testified that he turned her into his “wife” which she explained meant that he would have sex with her whenever he felt like it. The witness indicated that this person was ‘Jabie’. The witness testified that following ‘Jabie’s death, she was held and abused by ‘Allusein’.⁹⁰

Likewise, Witness TF1-133 testified that:

85. The Secretary-General, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, ¶ 1, delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000) (describing negotiations with the Government of Sierra Leone resulting in an agreement granting the SCSL the power to prosecute those individuals “who bear the greatest responsibility” for the serious crimes committed during the Civil War in Sierra Leone); see AFRC TJ, *supra* note 6.

86. See AFRC TJ, *supra* note 6, ¶ 14.

87. See *id.*

88. SCSL Statute, *supra* note 5, art. 4. See AFRC TJ, *supra* note 6, ¶ 15. For an excellent discussion of the SCSL’s adjudication of the war crime of recruitment, conscription and use of child soldiers, which marked the first instance of such judicial review in international law, see Valerie Oosterveld, *The Special Court for Sierra Leone, Child Soldiers, and Forced Marriage: Providing Clarity or Confusion?*, 45 CAN. Y.B. OF INT’L L. 131, 137–51 (2007).

89. See, e.g., AFRC TJ, *supra* note 6, ¶ 966–1068 (reviewing the evidence offered by the prosecution to substantiate Count 6, rape as a crime against humanity).

90. *Id.* ¶ 997.

[S]he and an unknown number of other women who had been captured by “rebels” were taken with the rebels - including ‘Cobra’ and “Brigadier” Mani - to Krubola where they stayed for seven months. . . .

In Krubola, the captured women cooked and “had sex” with the rebels and were forced to be their “wives”. The witness stated that when a woman [sic] was “betrothed” to a man, she became his “wife” which according to the witness, meant that “whoever you were with would have sex with you.” The witness testified that when the rebels captured women, they would have sex with them before bringing them to where the rebels were based. When the captured women were taken to the base, they would be handed over to a person who would have sex with that woman all the time. The “bosses and stronger guys” all had wives who were captured but the subordinates were not allowed to have wives. The subordinates would be sent to the front and they would always bring back captured civilians, including women.⁹¹

Pleading errors plagued the AFRC slavery allegations.⁹² The Trial Chamber dismissed Count 7, which set out the charges of sexual slavery and other forms of sexual violence charged under Article 2(g).⁹³ The Trial Chamber held that the prosecutor’s indictment pleaded cumulatively, rather than in the alternative—sexual slavery or sexual violence—rendering the indictment defective because the accused would be unable to discern what evidence pertained to sexual slavery and what evidence substantiated sexual violence.⁹⁴ Therefore, the Trial Chamber found Count 7, as charged, vague, duplicitous, and in violation of the due process rights of the accused, and dismissed it for these reasons.⁹⁵

Under Count 8, the prosecution advanced that forced marriage qualified as an offense, distinct from sexual slavery, punishable under the crime against humanity of other inhumane acts.⁹⁶ The Trial Chamber’s findings, however, diverged from that proposition. As a consequence, the Trial Chamber reviewed the evidence intended to prove sexual slavery under Count 8. Confusingly, it interpreted the term “forced marriage” as a spe-

91. *Id.* ¶¶ 1120-21. TFI-133 also recounted that:

She was appointed the “Mammy Queen” by ‘Pa Mani’, ‘Colonel Tee’ and their clerk Alhaji. As the Mammy Queen, the witness would investigate captured civilians who had been mistreated and cases where husbands or wives had sex with someone else’s spouse. If a woman was found guilty of having sex with someone else’s husband she could be given 200 lashes. If a man raped another man’s wife, he could be killed.

Id. ¶ 1123.

92. *See, e.g., id.* ¶¶ 19-95; *see also* Cecily Rose, *Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes*, 7 J. INT’L CRIM. JUST. 353 (2009) (discussing controversies surrounding the *Brima* indictment).

93. SCSL Statute, *supra* note 5, art. 2(g) (enumerating “[r]ape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence” as a crime against humanity); AFRC TJ, *supra* note 6, ¶¶ 92-95.

94. *See* AFRC TJ, *supra* note 6, ¶¶ 93-94. Even though the defense raised the argument to strike Count 7 from the indictment after the close of the proceedings, the Trial Chamber viewed the prosecution’s error as an egregious omission that must be remedied in order to protect the defense’s due process rights by an outright dismissal of the count, irrespective of the witness testimony. *See id.* ¶ 93.

95. *Id.* ¶¶ 93-95.

96. *Id.* ¶ 701.

cific crime.⁹⁷ Furthermore, it noted that:

[T]he crime of ‘other inhumane acts’ exists as a residual category in order not to unduly restrict the Statute’s application with regard to crimes against humanity. “Forced marriage” as an ‘other inhumane act’ must therefore involve conduct not otherwise subsumed by other crimes enumerated under Article 2 of the Statute.⁹⁸

When deliberating whether the crime of forced marriage constituted an “other inhumane act,” the Trial Chamber extracted the sexual slavery aspect of forced marriage and only considered evidence of non-sexual acts.⁹⁹ The Trial Chamber determined that the gravity of the non-sexual acts did not rise to the threshold required under a charge of other inhumane acts.¹⁰⁰ It felt obliged, therefore, to dismiss the charge of other inhumane acts under Count 8.¹⁰¹ The Trial Chamber opined that forced marriage, as advanced by the prosecution, had been classified as sexual slavery under the dismissed Count 7 and was misplaced under Count 8 which charged other inhumane acts.¹⁰² The Chamber noted that:

97. Judge Sebutinde observed, in terms of the legal status of forced marriage, that: [I]t is clear that in understanding and characterising the phenomenon of ‘forced marriage’ in the Sierra Leone conflict, a clear distinction should be drawn between traditional or religious marital unions involving minors (early or arranged marriages), during times of peace; and the forceful abduction and holding in captivity of women and girls (‘bush wives’) against their will, for purposes of sexual gratification of their ‘bush husbands’ and for gender-specific forms of labour including cooking, cleaning, washing clothes (conjugal duties). In my view, while the former is proscribed as a violation of human rights under international human rights instruments or treaties like CEDAW, it is not recognised as a crime in International Humanitarian law. The latter conduct on the other hand, is clearly criminal in nature and is liable to attract prosecution.

Id. ¶ 12 (Sebutinde, J., concurring). See also Patricia Sellers, *Gender Strategy is Not a Luxury for International Courts*, 17 AM. U. J. GENDER SOC. POL’Y & L. 301 (2009) for a more thorough critique of the muddled legal analysis, which considered forced marriage as a verified crime under the crimes against humanity provision. The article suggests that forced marriage, like the descriptive phrase “ethnic cleansing” often used in the Yugoslav context, consists of a bundle of acts or patterns of conduct that is able to be charged and adjudicated under an appropriately enumerated crime contained in an operative statute.

98. AFRC TJ, *supra* note 6, ¶ 703.

99. See *id.* ¶ 697 (“In light of the exhaustive category of sexual crimes particularised in Article 2(g) of the Statute, the offence of ‘other inhumane acts’, even though residual, must logically be restrictively interpreted as applying only to acts of a non-sexual nature . . .”).

100. See *id.* ¶ 704 (“Having now examined the whole of the evidence in the case, the Trial Chamber by a majority is not satisfied that the evidence adduced by the Prosecution is capable of establishing the elements of a non-sexual crime of ‘forced marriage’.”).

101. *Id.* ¶ 713-14.

102. *Id.* In addition, the AFRC judgment noted that:

The Trial Chamber finds that the totality of the evidence adduced by the Prosecution as proof of “forced marriage” goes to proof of elements subsumed by the crime of sexual slavery. . . . [S]o-called “forced marriages” involved the forceful abduction of girls and women from their homes or other places of refuge and their detention with the AFRC troops as they attacked and moved through various districts. The girls and women were taken against their will as “wives” by individual rebels. The evidence showed that the relationship of the perpetrators to their “wives” was one of ownership and involved the exercise of control by the

[T]he Prosecution evidence in the present case does not point to even one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery. Not one of the victims of sexual slavery gave evidence that the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental.¹⁰³

Notwithstanding the dismissal of Counts 7 and 8, the Trial Chamber convicted the defendants of rape as a crime against humanity.¹⁰⁴ It also held that the evidence of sexual slavery fulfilled the legal elements of outrages on personal dignity, a war crime enumerated under Article 3(e) of the Statute.¹⁰⁵ The Trial Chamber reasoned that sexual slavery consisted of humiliation and degradation so serious as to be generally considered an outrage upon personal dignity.¹⁰⁶ Specifically, it found that “perform[ing] subservient acts” and “endur[ing] the constant fear of being subjected to physical, mental or sexual violence” constituted outrages upon personal dignity.¹⁰⁷ Seemingly, the non-sexual assault evidence that was of insufficient gravity to sustain the crime against humanity of other inhumane acts, set out in Count 8, could be relied upon to substantiate a conviction for the war crime of outrages upon personal dignity.

Pertinently, the Trial Chamber observed in *obiter dicta* that evidence of sexual slavery could lead to a conviction of enslavement.¹⁰⁸ Count 13 in the *AFRC* case indicted the defendants for enslavement as a crime against humanity under Article 2(c).¹⁰⁹ Count 13 was based entirely upon the abductions and forced labor of civilians and did not contain any facts related to the sexual violence inflicted upon the individuals thus enslaved.¹¹⁰ Although Count 13 alleged the non-sexual evidence of female abductions, forced labor, and the non-sexual evidence component of forced

perpetrator over the victim, including control of the victim’s sexuality, her movements and her labour; for example, the “wife” was expected to carry the rebel’s possessions as they moved from one location to the next, to cook for him and to wash his clothes. Similarly, the Trial Chamber is satisfied that the use of the term “wife” by the perpetrator in reference to the victim is indicative of the intent of the perpetrator to exercise ownership over the victim, and not an intent to assume a marital or quasi-marital status with the victim in the sense of establishing mutual obligations inherent in a husband wife relationship. In fact, while the relationship of the rebels to their “wives” was generally one of exclusive ownership, the victim could be passed on or given to another rebel at the discretion of the perpetrator.

Id. ¶ 711.

103. *Id.* ¶ 710.

104. *Id.* ¶¶ 2104–06.

105. *See id.* ¶ 1069.

106. *See id.* ¶¶ 718–19.

107. *Id.* ¶ 719.

108. *Id.* ¶ 739.

109. *See id.* ¶ 740.

110. *See id.* ¶¶ 739, 1279–1394 (recounting the allegations and findings with respect to Count 13, abduction and forced labor).

marriages,¹¹¹ none of the submissions referred to any of the acts of sexual violence inflicted upon the females. Ultimately, the Trial Chamber retreated from a more thorough evaluation of this alternative legal analysis and simply stated that the sexual violence committed in the AFRC case should not be considered under enslavement because a basis for a conviction already existed under Article 3(e), proscribing outrages upon personal dignity.¹¹² This contention will be revisited in the second section of this Article.

The Trial Chamber also convicted the defendants for their participation in the conscription, enlistment, or use of children in hostilities as set forth in Article 4(c).¹¹³ There is ambiguity, however, as to whether girls were considered to have been recruited as child soldiers or as sexual slaves. Girls who had been abducted, forced to work, cook, take care of children, and perform other tasks, saw this conduct examined as part of the *actus reus* of other inhumane acts, under Count 8, which considered the viability of forced marriage as a crime.¹¹⁴ Neither the prosecution nor the Trial Chamber sufficiently examined such evidence as proof of conscription, enlistment, or use of children in hostilities. Irrespective of the earlier quoted testimony, which detailed non-sexual acts of enslavement, the crimes committed against women and girls were gendered as being either sexualized or connected to conjugal situations.¹¹⁵ The failure to recognize the status of these girls as child soldiers denied them the redress afforded under Article 4(c) and blurred the multiple roles of the female child soldier. Contrastingly, the Trial Chamber did not find that the boy soldiers who were forced to witness and participate in sexual violence were held in sexual slavery.¹¹⁶

On review, the Appeals Chamber held that the crime of other inhumane acts under Article 2(i) did not exclude sexually violent conduct.¹¹⁷ Indeed, it noted this even in light of the extensive listing of sex-based crimes under Article 2(g), including the crime of any other form of sexual violence.¹¹⁸ Next, the court found that forced marriage was distinct from the crime of sexual slavery and that marriage was not subsumed by the

111. See, e.g., ¶ 1338 (recounting the testimony of a female witness who was captured and forced to marry a man named “Jabie,” as evidence of enslavement of civilians in the Koinadugu District).

112. See *id.* ¶ 739. This dicta begs further elaboration. To infer that a conviction for enslavement under Count 13 as a crime against humanity has legal parity or equity with the war crime of outrages upon personal dignity is perplexing.

113. See *id.* ¶¶ 727-38.

114. See *id.* ¶¶ 701-06.

115. See *id.* ¶ 713.

116. See generally *id.* ¶¶ 727-38.

117. See AFRC AJ, *supra* note 6, ¶¶ 181-86.

118. *Id.* ¶ 186. The Appeals Chamber vindicated the position forwarded by Judge Doherty who opined that:

[C]onduct contemplated as “forced marriage” does not necessarily involve elements of physical violence such as abduction, enslavement or rape, although the presence of these elements may go to proof of the lack of consent of the victim. The crime is concerned primarily with the mental and moral suffering of the victim.

latter.¹¹⁹ Decisively, it ruled that conduct consisting of abductions and forced conjugation satisfied the elements of other inhumane acts under Article 2(i).¹²⁰ The Appeals Chamber refrained from reversing the Trial Chamber's dismissal of Count 8 and, moreover, did not enter a conviction on the grounds of other inhumane acts.¹²¹ In sum, the AFRC judgments offered muddled interpretations and understandings of the legal status of acts amounting to forced marriage and its relationship to enslavement during times of war.

However, a second significant SCSL case, *Prosecutor v. Sesay*, commonly known as the *RUF* case, led to a transformation in the legal interpretation of the conduct classified as forced marriage.¹²² The prosecutors in the *RUF* case charged the defendants, militia members of the Revolutionary United Front and comrades of the AFRC militia, with eight counts of crimes against humanity under Article 2,¹²³ eight counts of war crimes under Article 3,¹²⁴ and two counts of other serious violations of the law and customs of war under Article 4.¹²⁵

The Trial Chamber in the *RUF* case found, as did the AFRC Trial Chamber, that Count 7 was duplicative because it charged sexual slavery and any other form of sexual violence under the same count.¹²⁶ However, the Trial Chamber remedied the imprecise pleading by striking the offense of any other form of sexual violence and proceeding only on the basis of the sexual slavery charge.¹²⁷ Consequently, it handed down convictions for sexual slavery as a crime against humanity.¹²⁸ The Trial Chamber considered sexual slavery a "particularised form of slavery or enslavement," even though "acts which could be classified as sexual slavery have been prosecuted as enslavement in the past."¹²⁹ It also found that the perpetrators or "husbands" knowingly exercised the power of ownership over their "wives," satisfying the constitutive elements of sexual slavery.¹³⁰

AFRC TJ, *supra* note 6, ¶ 52 (Doherty, J., dissenting in part).

119. AFRC AJ, *supra* note 6, ¶ 196 ("[T]he Appeals Chamber finds that in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.").

120. *Id.* ¶¶ 200-02.

121. *Id.* ¶ 202.

122. RUF TJ & RUF AJ, *supra* note 7.

123. RUF TJ, *supra* note 7, ¶¶ 129, 136, 143, 152, 164 (charging defendants with extermination, murder, rape, sexual slavery, and other inhumane acts respectively).

124. *Id.* ¶¶ 110, 122, 141, 173, 204, 236 (charging defendants with acts of terrorism; collective punishments; violence to life, health and physical or mental well-being of a person, in particular murder; outrages upon personal dignity; pillage and the taking of hostages respectively).

125. *Id.* ¶ 183 (charging the defendants with enlistment or conscription of children soldiers under the age of 15).

126. *Id.* ¶ 457.

127. *Id.* ¶ 458.

128. *See, e.g., id.* § IX, Disposition, Count 7.

129. *See id.* ¶ 155.

130. *See id.* ¶¶ 158, 1293-94.

Count 8 of the indictment charged the accused with the crime against humanity of “other inhumane acts,” based upon factual allegations of women and girls who were forced into marriages and coerced into “conjugal duties” by their husbands.¹³¹ Similar to the *AFRC* case, the evidence submitted for forced marriage was completely congruent with the evidence submitted for sexual slavery. The Trial Chamber satisfied itself that:

[T]he conduct described by numerous reliable witnesses that rebels captured women and “took them as their wives” in Koidu and Wenedu satisfies the *actus reus* of ‘forced marriage,’ namely the imposition of a forced conjugal association. We consider that the phenomenon of “bush wives” was so widespread throughout the Sierra Leone conflict that the concept of women being “taken as wives” was well-known and understood.¹³²

The Chamber observes that the conjugal association forced upon the victims carried with it a lasting social stigma which hampers their recovery and reintegration into society. This suffering is in addition to the physical injuries that forced intercourse commonly inflicted on women taken as “wives”. The Chamber thus finds that the perpetrators’ actions in taking “wives” in Koidu inflicted grave suffering and serious injury to the physical and mental health of the victims, and that the perpetrators were aware of the gravity of their actions.¹³³

Curiously, to determine the permissibility of cumulative convictions for the crimes of sexual slavery and other inhumane acts, the Trial Chamber compared the elements of sexual slavery and forced marriage rather than the elements of the former two crimes. Based on this interpretation, it held that:

[T]he conduct charged under Count 8 is distinct from the charges of sexual slavery under Count 7 (sexual slavery). The Appeals Chamber has explicitly held that ‘forced marriage’ is not subsumed by sexual slavery. The distinct elements are forced conjugal association based on exclusivity between the perpetrator and victim. Therefore a conviction on both Counts 7 (sexual slavery) and 8 (other inhumane acts) is permissible.¹³⁴

Lastly, Count 13 charged the crime against humanity of enslavement for the abduction and forced labor of civilians.¹³⁵ The Trial Chamber

131. See, e.g., *id.* ¶ 1211-26 (recounting evidence of forced marriages in Kissi Town). The Trial Chamber particularly noted the testimony of Witness TF1-016:

[She,] her daughter and the other civilian women were forced to accompany the RUF on foot to Kissi Town, carrying rice on their heads. When they arrived, the rebels gave the rice to their leader, Alpha. The RUF then distributed the female captives among themselves, with each rebel saying “this is my own wife”. Both TF1-016 and her daughter were given to rebels as wives in this fashion. . . .

. . . (1212) Kotor also made TF1-016 have sex with him on a daily basis, whenever he wished, despite her attempts to tell him that she did not consent. . . .

. . . (1213) TF1-016 told her daughter to be patient because “this is the war” and there was nothing that the women could do about it.

Id. ¶¶ 1211-13.

132. *Id.* ¶ 1295.

133. *Id.* ¶ 1296.

134. *Id.* ¶ 2307.

135. *Id.* ¶ 195.

entered a conviction under Count 13, based upon evidence of civilian males, females, and children who were forced to work in the diamond mines or to perform other intensive manual labor. The Chamber found that:

[M]ining in Tongo Field contain[s] ample evidence that the AFRC/RUF troops intentionally exercised powers attaching to the right of ownership over civilians. Specifically, civilians were assembled and given orders to mine by AFRC/RUF Commanders, including by Bockarie. Civilians were forcibly captured from surrounding villages and brought to the mines, often in physical restraints such as ropes. Civilians were forced to labour in the presence of armed guards, who frequently beat or killed those who attempted to escape or committed other perceived breaches of the mining rules. . . . Civilians were treated cruelly through deprivation of food and medical assistance. Civilians were forced to work naked, enabling the guards to exercise psychological control over them.¹³⁶

Enslavement evidence submitted before the Trial Chamber consisted of hundreds of abductions, forced gatherings, forced manual labor, and even recounted the forced nudity endured by laborers. Thus, the RUF/AFRC militia guards were found to have exercised the rights attaching to ownership over the enslaved civilians, such as the immediate infliction of death and forced nudity.¹³⁷ The Trial Chamber was satisfied that the *mens rea* and *actus reus* of enslavement were fulfilled and found the defendants guilty of enslavement.¹³⁸

Curiously, neither the indictment nor the subsequent pleadings granted the judiciary the discretion to examine patterns of female slavery as a whole—abduction, forced transportation, coerced conscription, repeated sexual assaults, coerced breeding, domestic labor, soldiering duties, psychological, physical, social, and civic restrictions, alienation from family, community, and village. Such patterns were often endured for years, and could have qualified under Article 2(c), proscribing enslavement as a crime against humanity. Only female-based slavery, dubbed “forced marriage,” was limited to either sexual slavery or other inhumane acts and was neither legally grasped nor properly categorized as the crime of enslavement. The *AFRC* and *RUF* cases reveal the swirling confluence of war and female slavery. The next section offers commentary amid the turbulence.

II. Revisiting Female Wartime Slavery

To revisit female slavery and impolitely ogle the female slave requires skilled sleuthing. Failure to redress the war crime of slavery committed

136. *Id.* ¶ 1119.

137. *See, e.g., id.* ¶ 1121.

138. *See id.* § IX, Disposition Count 13 for each Defendant; *see also* RUF AJ, *supra* note 7, ¶ 22 (“The Trial Chamber sentenced Sesay to a total term of imprisonment of fifty-two (52) years and Kallon to a total term of imprisonment of forty (40) years. The majority of the Trial Chamber sentenced Gbao to a total term of imprisonment of twenty-five (25) years.”).

against the “comfort women,” in human rights terminology, deprived them of access to justice. Omission and the invisibility of the “comfort women” are at the root of the distorted examination of female wartime slavery. It contorts the historical view of the Japanese army’s slave labor policies and glosses over institutionalized female slavery. Wartime slavery as a crime was desexualized and, concomitantly, crimes of sexual violence were devoid of any context of slavery.

Fortunately, modern international judicial courts and tribunals have made conscious and notable efforts to prosecute crimes committed against females. However, inconsistencies and a lack of legal parallelism permeate, to different degrees, the ICTY and SCSL judicial decisions. This could be explained, in part, by the constitutive statutes of the respective institutions. Significantly, the statutes of the ICTY and the SCSL differ in their enumeration of slavery crimes.

Although the ICTY Statute set out enslavement as a crime against humanity, it did not also explicitly proscribe or enumerate the crime of sexual slavery.¹³⁹ In contrast, the Statute of the SCSL enumerated charges of enslavement and sexual slavery under Article 2, defining crimes against humanity.¹⁴⁰ Many commentators considered the presence of the specific crime of sexual slavery in the SCSL Statute to be a legal advance for females. It received praise similar to that given for the inclusion of sexual assault crimes in the Rome Statute of the ICC.¹⁴¹ Nevertheless, the SCSL erected a new and different set of legal challenges when it employed the Article 2(g) sexual slavery charge in the *RUF* case. In the *AFRC* case, the dismissal of the count charging sexual slavery and sexual violence, as well as the Trial Chamber’s discretionary decision to eliminate sexual violence evidence from the count of other inhumane acts, stunted the legal redress available to modern female slaves.

Article 3 of the SCSL Statute incorporates prohibitions against war crimes common to the Geneva Conventions of 1949,¹⁴² as well as provisions of the Additional Protocol II to the Geneva Conventions, such as Article 4(2).¹⁴³ However, Article 3 of the SCSL Statute contains only a subset of the enumerated provisions of Article 4(2). Significantly, it does not

139. See ICTY Statute, *supra* note 37, art. 5.

140. See SCSL Statute, *supra* note 5, art. 2.

141. See, e.g., Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT’L L. 605 (2004); see also Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The Rome Statute lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity as: 1) crimes against humanity; 2) grave breaches of the Geneva Conventions; and 3) serious violations of Article 3 common to the four Geneva Conventions. *Id.* arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

142. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

143. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. Article 4(2) of the Additional Protocol II prohibits the following acts:

include the prohibition against slavery and the slave trade in all their forms.¹⁴⁴ This is a curious drafting oversight given the media attention and the historical facts documenting the countless females abducted during the war.¹⁴⁵ Article 3 of the SCSL statute did not enumerate slavery and the slave trade, which effectively removed the war crime complement to the crime against humanity of enslavement and sexual slavery. The drafting omission suggests incomplete access to justice for the female slave.

As a result of statutory construction, prosecutorial charging strategy, judicial holdings, and the entirety of acts identified in the *AFRC* case, forced marriage was contorted or squeezed to fit the crimes of “other inhumane acts” and outrages upon personal dignity.¹⁴⁶ Instinctively, one senses the occurrence of more mammoth criminal conduct. Thus, the limited and inappropriate legal characterization of forced marriage permeates the *AFRC* trial and appellate decisions. Forced marriage linguistically seems analogous to other practices or institutions of slavery, such as the marrying or inheriting of girls and women, which is addressed in the 1957 Supplemental Convention.¹⁴⁷ Indeed, recall that the *AFRC* Trial Chamber ruled to sever the applicability of sexual violence evidence from the charge of other inhumane acts and only considered non-sexual evidence.¹⁴⁸ Therefore, the analysis of forced marriage as an “other inhumane act” further missed an opportunity to lucidly comprehend female wartime slavery and respond legally.

This author agrees with Oosterveld’s view that the Trial Chamber’s decision to shed the non-sexual aspects of forced marriage and view the significant conduct as sexual “reduces a rather complex situation to its least complex, but perhaps most obvious, aspect.”¹⁴⁹ Although it was paramount for the *AFRC* Trial Chamber to recognize and redress the sexual component of the gender crimes, the significance was diminished by the artificial bifurcation of facts that misconstrued the historical context and led to a partial and unsatisfactory legal redress. The same inadequacy would have occurred if the *AFRC* Trial Chamber had only considered the

-
- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
 - (b) Collective punishments;
 - (c) Taking of hostages;
 - (d) Acts of terrorism;
 - (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
 - (f) Slavery and the slave trade in all their forms;
 - (g) Pillage;
 - (h) Threats to commit any of the foregoing acts.

144. Compare SCSL Statute, *supra* note 5, art. 3, with *id.* art. 4(2).

145. See, e.g., Amnesty Int’l, *Sierra Leone: A Disastrous Set-Back for Human Rights*, AFR 51/005/1997 (1997), available at <http://www.amnesty.org/en/library/info/AFR51/005/1997/en>.

146. See *AFRC* TJ, *supra* note 6, ¶¶ 701–722.

147. See 1957 Supplementary Convention, *supra* note 57, art. 1.

148. See *AFRC* TJ, *supra* note 6, ¶ 704.

149. Oosterveld, *supra* note 88, at 155.

non-sexual conduct of forced marriage. The AFRC Appeals Chamber reversed the artificial factual separation of forced marriage conduct.¹⁵⁰ Still, the Appeals Chamber chose not to enter a conviction for other inhumane acts based upon the sexual and non-sexual assault conduct, thus confirming the acquittal and refraining from examining the forced marriage conduct in its entirety under the crime of enslavement.¹⁵¹

Neither did the Appeals Chamber deliver a thorough pronouncement, nor *obiter dicta*, regarding the legal applicability of forced marriage evidence in relation to such violations being proof of enslavement as a crime against humanity. Granted, the prosecution did not raise this ground on appeal, nonetheless, the Appeals Chamber ostensibly reviewed the legal and factual aspects of forced marriage and could have used its discretion to make more pivotal and lucid observations. Such observations could have potentially informed future international jurisprudence.

The RUF case somewhat remedied the vagueness of the Count 7 charge, which alleged sexual slavery and any other form of sexual violence, but only by allowing for the charge of sexual slavery as a crime against humanity.¹⁵² However, it still advanced forced marriage as a provisional crime and held that forced marriage conformed to the prerequisites of the crime of other inhumane acts.¹⁵³ This is somewhat troubling. Even abstaining from a discussion about the potential contraventions of the principles of legality, one is particularly struck by the illogical outcome; the creation of an important offense, forced marriage, itself a form of slavery, is beholden to proof of other inhumane acts. This two-tiered process creates legal ambiguity and hints at a legal hierarchy that diminishes the significance of this form of female slavery.

Therein lies a vital observation. Splintering the sexual manifestation of female enslavement under different enumerated crimes—forced marriage, other inhumane acts, sexual slavery, or outrages upon personal dignity—while omitting the non-sexual acts of ownership, the circumstances of slave trading, and forgoing the allegations of enslavement and slavery, is legally unsatisfactory. At the SCSL, the prosecution reserved Article 2(c) enslavement for charges of non-sexual forced labor.¹⁵⁴ The SCSL, however, should have viewed forced marriage, in its initial characterization, as a form of enslavement. This legal approach is distinct from charging combinations of other crimes such as rape and outrages upon personal dignity,

150. See AFRC AJ, *supra* note 6, ¶ 195.

151. Oosterveld, *supra* note 88, at 154-159. Oosterveld convincingly advances the position that international prosecutions should more assiduously identify and redress the broad swath of non-sexual components of gender crimes committed against females and sexual abuse committed against boys during the Sierra Leone war.

152. Compare RUF TJ, *supra* note 7, ¶ 153 (striking any other form of sexual violence from Count 7, but allowing the charge of sexual slavery to stand), with AFRC TJ, *supra* note 6, ¶¶ 92-95 (dismissing count 7 of the indictment, sexual slavery and any other form of sexual violence, because it charged two separate offenses under the same count).

153. See RUF TJ, *supra* note 7, ¶¶ 164-72.

154. See, e.g., AFRC TJ, *supra* note 6, ¶ 739.

which the prosecution successfully pursued in the *AFRC* case. Clearly, forced marriage readily lends itself to the characterization of enslavement. Absent charges of enslavement or the availability of the war crime of slavery, various acts integral to wartime female slavery, such as abduction, branding, transportation of agricultural, military, or household goods, alienation from family, domestic labor, child bearing, breastfeeding, and other “gender-specific forms of labour,”¹⁵⁵ are ignored as an interrelated whole set of conduct. In the *AFRC* case, forced marriage conduct, even without evidence of sexual violence, clearly merited adjudication under Article 2(c) enslavement.

Such legal splintering results in inadequate judicial redress. The reality of female slaves’ sexual abuse is torn from the reality of their non-sexual burdens—labor, social roles, torture, persecutions, travails, and other acts of their enslavement. Did international instruments that penalized acts of female slavery—whether described as sexual trafficking, liability to be inherited, marriage upon payment of a consideration, or delivery with a view to exploitation—unnecessarily blur, rather than clarify, the synonymous character of female slavery and enslavement? Non-recognition of the complexity of slavery, in particular female slavery, hinders complete legal redress and forestalls the eradication of slavery.

Cases brought before the International Criminal Court (ICC) under the Rome Statute¹⁵⁶ will further the development of the jurisprudence of enslavement. Article 7(2)(c) of the Rome Statute sets out enslavement as a crime against humanity that entails the “right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”¹⁵⁷ The Rome Statute clearly provides that trafficking is inseparable from the bundle of acts of enslavement, specifically the slave trade.¹⁵⁸ However, the crime of sexual slavery requires factual proof of at least one act of sexual violence such that all subsequent slavery conduct is included within the charge of sexual slavery.¹⁵⁹ In essence, the sexual act requirement impedes the classification of the crime of enslavement. Rather than being seen as a sub-set of enslave-

155. See, e.g., *id.* ¶ 10 (Sebutinde, J., concurring).

156. Rome Statute, *supra* note 141.

157. *Id.* art. 7(2)(c).

158. See KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 107 (2001).

159. The ICC elements of the crime against humanity of sexual slavery are:

- (1) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
- (2) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
- (3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- (4) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Rome Statute Elements of Crimes art. 7(1)(g)-2, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

ment and a separate charge, sexual slavery could functionally deny a victim full judicial redress. The query is whether the ICC will reinforce the SCSL's splintered approach or legally characterize all slavery conduct as enslavement—even if the sub-set could be cumulatively charged.

Moreover, under the ICC's definition of sexual slavery, what act of sexual exploitation satisfies the requirement of "one or more acts of a sexual nature"? Could the persistent forced nudity of the mine workers in the *RUF* case,¹⁶⁰ for example, reach the threshold of significant sexually exploitive conduct that would merit the description of sexual slavery, as opposed to enslavement? Or, would the forced labor outweigh the acts of forced nudity and, thus, justify the interpretation that all those acts of slavery should be classified as enslavement? Therefore, it is possible that such conduct could form the basis of a sexual slavery as a crime against humanity charge, but not slavery as a war crime. The extensive lists of war crimes applicable to international and non-international armed conflicts under the Rome Statute do not enumerate slavery or the slave trade, only sexual slavery.¹⁶¹ This is disconcerting, especially in light of international humanitarian law that could have been invoked to support such provisions.¹⁶² As a result, prosecution for slavery and the slave trade becomes elusive under the Statute, for men as well as women, and sexual slavery risks becoming feminized.

The ICC in *Prosecutor v. Katanga*, a Pre-Trial Chamber case, confirmed charges of sexual slavery both as a crime against humanity and as a war crime.¹⁶³ The factual bases of the charge are similar to the wartime circumstances of female slavery during the Sierra Leone conflict including abduction, transport, detention, child bearing, child weaning, and forced conjugal-like situations.¹⁶⁴ Essentially, like the bases of the convictions in the *RUF* case before the SCSL, the *Katanga* case involves the prosecution of rebel militia members for, *inter alia*, the capture and reduction of girls and young women into slavery.¹⁶⁵ Neither the *Katanga* prosecution nor the Pre-Trial Chamber, as of yet, appear ready to attach the characterization of enslavement as a crime against humanity to this conduct, which includes

160. See, e.g., *RUF* TJ, *supra* note 7, ¶ 1093.

161. Rome Statute, *supra* note 141, art. 8(2)(b)(xxii).

162. See, e.g., Additional Protocol II, *supra* note 1433, art. 4(2)(f) (prohibiting slavery and the slave trade in all their forms).

163. *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Urgent Warrant of Arrest, 6 (July 2, 2007).

164. *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 347-354 (Sept. 30, 2008).

165. The Decision on the Confirmation of Charges in *Katanga* notably includes the 1957 Supplementary Convention's precepts of the slave trade and the reduction of persons into slavery. The *Katanga* Pre-Trial Chamber found that:

[i]t is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking of persons, in particular women and children.

trafficking in women and children.¹⁶⁶

Additionally, cases before the Extraordinary Chambers in the Court of Cambodia (ECCC) will examine evidence that might force the court to confront the factual and legal combination of enslavement and forced marriages executed as a population policy by the Khmer Rouge regime.¹⁶⁷ History confirms that young male and female detainees at Khmer reeducation camps were ordered to “marry” unknown partners en masse and were forced to perform sexual acts to consummate the marriages.¹⁶⁸ In short, the Khmer Rouge utilized forced copulation to increase the politically correct Khmer Rouge population.¹⁶⁹

Although the Cambodian scenario differs from the factual patterns in Sierra Leone, neither scenario contemplates the crimes committed against enslaved children. Furthermore, the Cambodian facts are slightly reminiscent of the forced breeding inflicted upon American slaves, male and female, replete with the consequent enslavement of any offspring.¹⁷⁰ There is no enumerated crime or definition of forced marriage under the statute

Id. ¶ 344.

166. See generally *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Urgent Warrant of Arrest, 6 (summarizing the charges against the accused, which does not include a charge of enslavement as a crime against humanity, article 7(c)). A shortcoming of the sexual slavery charge under the Rome Statute characterization is that a person, such as the child born of a female slave, who has not been held out to engage in a sexual act does not satisfy the elements of sexual slavery, and therefore is not covered factually by a charge of sexual slavery. Also, do the sexual assaults under sexual slavery have to entail physical harm? Are sexual threats or sexual torture sufficient? What about boy soldiers forced to witness and participate in sexual assaults who were enslaved, though not sexually enslaved? The profile of the sexual victim under international law is broader and includes individuals other than the person who is physically subjected to the sexual violence. For example, the ICTY found that men forced to watch sexual violence, such as Witness D in *Prosecutor v. Furundzija*, were sexually tortured. See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 267 (Dec. 10, 1998). Would an analogous act transform enslavement to sexual slavery?

167. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. Res. 57/228 B, 2329 U.N.T.S. 117 (June 6, 2003) [hereinafter ECCC Statute].

168. See, e.g., MICHAEL VICKERY, *CAMBODIA: 1975-1982* (1984). Significantly, the internal guidelines of the ECCC provide victims of the Khmer Rouge with an opportunity to participate in criminal proceedings as Civil Parties. See Alain Werner & Daniella Rudy, *Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?*, 8 NW. U. J. INT'L HUM. RTS. 301 (2010).

169. See VICKERY, *supra* note 168, at 174-75; see also *Prosecutor v. Noun, S. Ieng, Khien & T. Ieng*, Closing Order, Case 002/19-09-2007-ECCC-OCIJ, ¶¶ 842-861, 1393, 1430-1432, (Sept. 15, 2010), available at <http://www.eccc.gov.kh/english/cabinet/courtDoc/740/D427Eng.pdf>. The Closing Document stated that, “[b]oth men and women were forcibly married under the CPK regime. Most were in their twenties at the time of the marriage, however there were also occasions where spouses were younger or older . . . Several witnesses who were forcibly married were former monks who had been disrobed.” *Id.* ¶ 842. Within the context of acts of forced marriage, the Closing Document also finds, for purposes of answering to the charge of enslavement as a crime against humanity, that as part of the Common Plan of the Khmer Rouge, “[t]he choice of spouse was imposed and responsibility for children’s education was taken away from their parents.” *Id.* ¶ 1393.

170. See HOWELL, *supra* note 49 and accompanying text.

of the ECCC.¹⁷¹ Therefore, any cases of this nature brought before the ECCC might face the legal quandaries that the SCSL cases have already faced. Still, the Cambodian situation may also prompt a closer examination of masculine forced copulation, female forced copulation, and breeding of children, which will likely oblige the judges to resurrect a deeper appreciation of enslavement.

Finally, to revisit sexual slavery requires an adroit ability to decipher and confront linguistic monikers, such as “trafficking” and “white slavery,” and non-legal linguistic appellations such as “prostitute.” Yoshiaki Yoshimi’s reflection on the Japanese soldiers’ pretenses that they were participating in socially acceptable practices, rather than engaging in wartime slavery,¹⁷² remains a deft warning. The modern phrasings of “forced marriage” are cloaked in euphemisms, replete with double meaning, and infused with facetious analogies to legitimate societal institutions.¹⁷³

In the *AFRC* case, Justices Doherty and Sebutinde cautioned against such misnomers and deplored defense submissions that insistently linked forced marriage to customary or arranged marriage practices.¹⁷⁴ The expert witnesses of both the prosecution and the defense declined to fall for this bait, and jointly refrained from any concession that the wartime slavery practices were a reenactment of societal or cultural norms. The defense’s expert witness, Dr. Thorsen, astutely questioned the “the long-term consequences of making straightforward links between complex social practices of arranging marriages between kin groups, international conceptualisations of ‘forced marriages’ and the coercion of women into being bush wives during the civil war in Sierra Leone.”¹⁷⁵

Indeed, linguistic camouflage conceals how perpetrators of wartime female slavery rely on conservative and deluded patriarchal beliefs that institutionalized slavery mimics other accepted societal institutions. Concealing the true nature of these crimes leads to female slaves being named prostitutes or stigmatized as girls who accepted slavery in exchange for protection or wartime survival.¹⁷⁶ Sexual slavery is not stripped of its customary, *jus cogens*, or peremptory status because it provides protection to supposedly socially unacceptable or desperate females. The status of the victim does not legitimize slavery. Inappropriate language only serves to compound female enslavement and does nothing to dilute the intensity of slavery. Whether hidden in the prosecutorial missteps of the *AFRC* case or couched in the “victory” of the *RUF* case, euphemistic references to female slavery contort enslavement, refract the truth, and belie the veracity of the unadorned term “female slave.”

171. See ECCC Statute, *supra* note 167, arts. 3–8.

172. See generally YOSHIMI, *supra* note 10.

173. See *supra*, Section I.C.

174. See, e.g., *AFRC TJ*, *supra* note 6, ¶ 36 (Doherty, J., dissenting in part).

175. See *id.* ¶ 9, n. 3462 (Sebutinde, J., concurring).

176. See, e.g., *id.* ¶ 29 (Doherty, J., dissenting in part).