

CRIMES OF WAR, CRIMES OF PEACE: SEXUAL VIOLENCE, 'WOMEN'S RIGHTS AS HUMAN RIGHTS' & THE CRIMINAL JUSTICE SYSTEM

Introduction

Within both international and national criminal justice systems (at least in the developed West), the 'women's rights' movement and its insistence on the need to redress the historic inadequacy of responses to violence committed against women has led to change. Whether through attempts at rape law and procedural reform in the domestic contexts or the development of a new body of international criminal jurisprudence and best practice in the international context, the need to seriously respond to the traditional impunity for gendered violence has been embraced in the rhetoric of criminal justice.

However, what have these efforts to make the criminal justice more 'gender sensitive' achieved? Are we really seeing a new era of accountability for violence against women? And what are the broader ramifications on the discourse of human rights of this newfound concern for punishing gendered crimes? In this paper, by considering an example of both an international – the UN Special Court for Sierra Leone – and a national – in this case Australian – prosecution for sexual violence, I will investigate the extent to which this new rhetoric of 'gender sensitivity' reflects a real change in the traditionally male-centred institutions of criminal justice. In doing this, I am interested in analysing how the nature of the violations are characterised, the definitions of the crimes employed and how this impacts on the severity of the punishment.

Essentially, by using these examples I seek to argue that the language of 'women's rights' may well have found its way into the criminal justice system's response to sexual and gender-based violence but the extent to which this has actually changed the phallogentric core of the system is highly debatable. The ways in which female victims of sexual violence are – and indeed *need to be* – constructed have changed little despite years of

extensive feminist documentation and critique. So too, the nature of the violation being punished remains remarkably static: tied to notions of honour and shame and reliant on a certain symbolic significance of women's bodies that has little to do with that of a rights-bearing and autonomous individual. Finally – and perhaps most troublingly – the rhetoric of 'advancing women's rights', whilst providing the justification for particular criminal justice responses can in fact be seen in some instances be detrimental to other rights claims.

The International/National or War/Peace Distinction

It may seem an unnecessary and tenuous stretching of this paper to attempt to cover both international and national criminal justice responses to violence against women. Indeed for many, the analogy is highly problematic: a recent article I submitted to the *Journal of International Criminal Justice* on the International Criminal Court's definition of rape met with general approval *except* for my assertion that it was possible and indeed desirable to see the types of rape falling within the jurisdiction of international law as an extension of those generally dealt with by national justice systems. I was told that my critique of other international law scholars and practitioners who maintained a sharp distinction was ill advised, not only for moral reasons (how could I suggest that we ask a genocide victim if she consented to sex with her attacker?) but for legal reasons (international criminal law was by definition concerned with different criminal conduct than national criminal justice).

I stand by my assertion and hopefully through this paper I will better explain why I think this is important. As this is still an area I am thinking through, I would be very grateful for your comments on this issue in discussion time.

The reasons I think the challenging of the rape in war/rape in peace distinction is important are threefold:

1. By looking at, on the one hand the claims made regarding what international criminal justice offers to women and the 'women's human rights'

cause more generally, and on the other the ways in which crimes ostensibly committed against individual women are characterised in order to be punishable – and others (see Copelon 1995; Chesterman 1997; MacKinnon 2006) see a reinvention of the troubling public/private dichotomy that feminist scholars have long identified as at the core of the criminal justice system's failure to properly respond to violence against women.

This has an effect not only on those women who engage with international criminal prosecutions. It has also impacted on the lives of women in those post-conflict societies supposedly benefiting from international legal interventions. It has created troubling precedents which continue to be reproduced at an international level, all apparently making progress in the protection of women's rights. And it also impacts on the ways in which sexual violence is understood and characterised even in contexts far removed from armed conflict and ethnic cleansing/genocide. This leads me to the second point I would make.

2. As I will demonstrate in the example of the 'Sydney gang rapes': this separation of 'war-like' rape that invokes analogies of Bosnia or WWII Japan and 'opportunistic' sexual violence more properly associated with 'peacetime' does little to trouble the dominant heteronormative and phallogentric order in which masculinity is constructed as 'naturally' sexually predatory and violent and femininity as 'naturally' sexually passive and vulnerable. Rather, as was the case in the Sydney gang rapes, what becomes the measure for the severity of censure is the extent to which rape can be seen as just an extreme form of 'normal' sexual relations between genders or exhibits exacerbating features that more properly place it in the realm of 'war like atrocity'.

As a result, what emerges as strikingly lacking in both international and national criminal justice responses to sexual violence is a genuine move towards the recognition of women's sexual and bodily autonomy. Rape remains classified by external factors – the perpetrators' intent, the effect on community or family – not the individual woman's experience of violation and violence. Indeed, many of those who so passionately advocate for the

maintenance of a distinction between war rape and that of peacetime seem remarkably unaware of the similarity of language employed by those who have survived.¹

3. Moreover, whilst international criminal law practitioners and scholars may well maintain certain strict legal distinctions, the human rights community has been less cautious. Many claims are made regarding the positive potential international criminal justice institutions hold for setting the standard for 'best practice' in institutional responses to gender-based and sexual violence (an issue I have discussed in detail in two recent articles) as well as advancing the recognition of women's human rights more generally.

This has led to the rather perverse situation where one of the *raison d'être* of international justice institutions – and indeed the basis on which human rights advocacy organisations campaign for their establishment and continued funding – is their potential for improving domestic legal standards relating to women's rights. Yet these very institutions and the scholars and practitioners who work with/in them refuse to recognise any relationship with domestic legal standards – and in fact with international human rights standards. They therefore create standards and jurisprudence that in fact hinder or at least do not assist reform movements, which call for greater

¹ Reading descriptions by Mertus (1999), Nikolić-Ristanović (2005), Nowrojee (2005) and Staggs-Kelsall and Stepakoff (2007) of victim witnesses' experiences testifying about sexual violence in international tribunals, I have often been struck by the similarity to the Sydney gang rape victims' description of their ordeal and subsequent encounter with the criminal justice system. Similar insensitivity and disregard on the part of many of those working within the system, a similar need to 'perform' the role of ideal victim and the knowledge of a selective institutional understanding of their experiences. (Mertus, Julie (1999) 'Only a War Crimes Tribunal: Triumph of the "International Community", Pain of the Survivors' in Cooper, Belinda (ed.) *War Crimes: the Legacy of Nuremberg*, TV Books, New York; Nikolić-Ristanović, Vesna (2005) 'Sexual Violence, International Law and Restorative Justice' in Doris Buss and Ambreena Manji (eds) *International Law: Modern Feminist Approaches*, Hart Publishing, Oxford and Portland Oregon; Nowrojee, Binaifer (2005) "Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?' Occasional Paper 10, *United Nations Research Institute for Social Development* available at <http://www.unrisc.org/publications/opgp10>; Staggs Kelsall, Michelle and Stepakoff, Shanee (2007) "When We Wanted to Talk About Rape": Silencing Sexual Violence at the Special Court for Sierra Leone' *The International Journal of Transitional Justice*, Vol. 1: 355-374).

protection for women. Meanwhile - as the Australian example I will discuss in a moment demonstrates – the war analogy penetrates ‘peacetime’ responses to violence against women creating a separate category of violence that *does* merit harsh condemnation whilst the everyday violence of women’s lives remains largely unchallenged.

As a result, I believe it is important to dismantle the false dichotomy created between the work of international criminal prosecutions and national. However, for the purposes of this paper it is in fact informative to consider *how* and *why* this distinction is maintained. Indeed, I believe the perceived importance of this distinction is illustrative of the very heart of the problem: the fundamentally unchanged phallogentrism that continues to pervade criminal justice institutions regardless of their international or domestic focus.

Women’s Rights as Human Rights

The literature on feminist engagements with both the criminal justice system and the human rights framework is vast and does not require lengthy recital here. I would argue that it is sufficient to simply point to three important features of feminist engagement with the criminal justice system:

- the tendency to mistrust women, particularly in relation to allegations of sexual violence. This has proven true in both national and international criminal prosecutions.
- the incapacity of the criminal justice system to move away from highly stereotyped and sexist constructions of normative male and female (sexual) behaviour. To use the language employed by Kristen Bumiller (1998) there is an ongoing tendency to require rape victims to fit the model of ‘fallen angels’ in order to receive sympathy and indeed some sort of legal recourse.
- linked to the former point, the misconstruction of rape as primarily about an attack on honour rather than a form of violence comparable to other forms of physical violence. Increasingly the criminal justice system – and indeed

numerous anti-rape advocates and feminist scholars – has adopted the language of rape as ‘violence not sex’ but as Catharine MacKinnon has pointed out:

The point of defining rape as ‘violence not sex’ has been to claim an ungendered and nonsexual ground for affirming sex (heterosexuality) while rejecting violence (rape). The problem remains what it has always been: telling the difference.²

A striking example of this very point can be found in one of the last Sydney gang rape trials where the judge refused to accept that a gynaecologist’s testimony that the victim had suffered some of the worst vaginal injuries was sufficient to infer she did not consent to sexual intercourse. This is despite the general common law principle that one cannot consent to actual bodily harm.³

Meanwhile in the context of international prosecutions, feminist legal scholars have sought to redress the traditional characterisation within international humanitarian law of rape as a crime against the honour of the family. However, as various scholars (Copelon 1995; Chesterman 1997; Charlesworth 1999) have argued – and as the Sierra Leone example I will provide in a moment will hopefully demonstrate – there has been an ongoing resistance/inability within international criminal jurisprudence to completely abandon the notion that the punishable aspect of sexual violence is its violation of communal rights.

At the same time, the ‘women’s human rights movement’, which gained momentum throughout the 1980s leading to its official recognition within the institutional human rights framework at the Vienna Human Rights Conference

² MacKinnon, Catherine A. “Rape: On Coercion and Consent” in Conboy, Katie, Medina, Nadia & Stanbury, Sarah (1997) *Writing on the body: Female embodiment and Feminist Theory*, Columbia University Press: New York, at 44

³ For details of this exchange between the judge and prosecutor see Sheehan, Paul (2006) *Girls Like You*, MacMillan, Sydney, at 99 and Grewal, Kiran (2008) *Gang Rape and the ‘Nasty Migrant’: A Comparative Analysis of the French and Australian Public Discourse*, unpublished thesis, University of Technology, Sydney.

in 1993 has attempted to confront the anthropocentrism of the international human rights discourse. In particular, it has led to a shift in the official rhetoric towards 'gender mainstreaming' which purports to:

- recognise how men and women experience rights violations in different ways and therefore may require differential rights protection;
- recognise the gendered nature of rights construction (the assumption of a neutral subject that is modelled on male experience).

This has added weight to advocacy for both domestic and international law reform on the issue of gender-based and sexual violence. And – at least superficially – it seems there has been some traction on the issue. However, by looking more closely at two recent examples of the 'triumph' of women's rights in the context of the criminal justice system, I want to ask the question: have we been too hasty in declaring this battle won or even winnable?

The 'Sydney Gang Rapes'

The 'Sydney gang rapes' I am referring to were actually 3 separate sets of gang rapes committed in the early 2000s, involving men identified as 'Lebanese'/'Muslim' men that received extensive and ongoing media and public attention. Indeed, for those who have lived in Sydney during the last 10 years – and possibly anywhere in Australia – the 'Sydney gang rapes' rarely need further explanation. Of the three, the 'Skaf rapes' were perhaps the most notorious.

It was alleged that Bilal Skaf had orchestrated numerous gang rapes involving up to 14 men at a time. Through intercepting mobile phone messages and calls between the men, police were eventually able to link the rapes back to Bilal Skaf and he was brought to trial for his involvement in three separate incidents on 10, 12 and 30 August 2000. Bilal Skaf made New South Wales and Australian history by being the first to be convicted under the new legislation and sentenced to 55 years; the harshest sentence ever

handed down for a crime other than murder. Through various appeals this sentence was reduced to 31 years but by this stage Bilal Skaf had become cemented in Australian public imaginary – as his own defence lawyer commented – he had become the “brand name for a gang rapist” (“Skaf: ‘Brand Name’ for gang rapist”, *Sydney Morning Herald*, 22 June 2008).

I could easily speak for hours on the complex discourses that were deployed in the public sphere in relation to these rapes: indeed it was the subject of my PhD thesis (which will hopefully appear as a book eventually!) and a number of journal articles that I can happily provide references to for anyone interested. However, for the purposes of this paper, I will limit my discussion to one particular feature of the responses to the rapes: the ‘ethnic conflict’ element.

Whilst working at Amnesty International on the Stop Violence against Women campaign, I remember attending a meeting at which we discussed proposed law reform we could use as the focus for future advocacy campaigns. One member of the meeting raised the example of the Skaf rape cases, citing with approval the extremely harsh sentences handed down: proof that the necessity of severe responses to violence against women was finally being accepted by at least one criminal justice system. I think it is safe to say that my rejection of this reading was met with some surprise: as the assistant legal adviser on gender, a feminist lawyer and an Australian it was expected that I would have been pleased with my own courts’ strong response.

Indeed, many rape victim advocates were celebratory of the Skaf case’s outcome. For example, in January 2003, *The Sun-Herald* reported Ms Karen Willis, Director of the NSW Rape Crisis Centre and a well-regarded and very well-known rape victim advocate as being enthusiastic about apparent increases in the rates of rape reporting. She was quoted as stating: “With what happened last year, with the publicity surrounding the gang rapes, women feel they may get a fairer go. And they feel they are being honoured

and treated with respect, which hasn't always happened in the past" (Keogh 2003).

However, I would like to provide a different reading. I would argue that, rather than the sentences handed down in the Skaf rape case representing a new, more 'women's rights'-focussed response to rape, the judge's reasoning points to another under-current that influenced the outrage – judicial, media, public and political – provoked by these rapes.

Court transcripts show Judge Finnane, in sentencing one of the rapists, feeling for the light switch that might illuminate the offences. Misogyny, contempts, drunken parties or even mass rapes by Japanese soldiers in Manchuria spring to his lips. The Bankstown rapes, he mused, are events "you hear about or read about only in the context of wartime atrocities". (Crichton & Stevenson 2002).

This is made even clearer in what *The Daily Telegraph* reported to be Justice Finnane's ultimate conclusion: "These cases concern one of the greatest outrages, in criminal terms, that has been perpetrated on the community in Sydney...military organised gang rape involving 14 young men" (Connolly 2008). The fact that these rapes emerge as acts 'perpetrated on the community', with no mention to the suffering of the individual young women is informative. It also unconsciously mirrors some of the claims being made within the mass media: that these rapes represented a 'crisis of tolerance', the death of multiculturalism and the ultimate act of 'hatred towards a community that has welcomed' the perpetrators and their families.

The alleged military metaphors employed by His Honour during the trial proceedings do not ultimately appear in his sentencing remarks. However His Honour does draw a rather alarming distinction between these gang rapes and other instances of similar crimes:

As I have earlier remarked these crimes were carefully planned and coordinated. The degree of planning and coordination distinguishes

these crimes from other cases of gang rape which have been reported from time to time, which are often, if not usually, perpetrated by intoxicated men who have seized an opportunity, which has been presented to them. (viewed 12 October 2008, <http://www.abc.net.au/4corners/stories/s675775.htm>)

It is in relation to these comments that my previous point regarding the dangers of maintaining the 'war'/'peace' distinction hopefully gains pertinence. This is but one example, which was repeated through the course of the legal, political and media discourses on the rapes, of the 'Sydney gang rapes' being set up as 'special' and 'more punishable' than other rapes *because they resembled war*. This had a number of significant outcomes:

- the 'ethnic' element of the crimes became a focus: namely the ethnic background of the accused, the construction of the victims as 'Australian' and thus – sometimes explicitly sometimes implicitly representative of the Australian community;
- this in turn fuelled anti-immigration and anti-multiculturalism discourses either through the 'need to protect our women' trope classic to nationalist and militaristic discourse or through the cultural superiority 'we don't treat our women that way' response that justified a reassertion of the dominant national identity without acknowledging the ongoing discrimination women face *across* cultures;
- 'ordinary' rapes were treated as not only unavoidable but of less importance: this last point is perhaps best captured in the parliamentary debate on the introduction of the new (more serious) offence of 'aggravated sexual assault in company'. Debate regarding inadequate judicial responses to sexual violence quickly shifted to discussing the *particularly* horrific nature of gang rape by strangers.

This final point is also a frequent feature of international criminal justice responses to rape. I think this is best captured in a recent article in the

American Journal of International Law where Judge Wolfgang Schomburg and Ines Peterson provide the following explanation for why consent should be considered irrelevant in international rape prosecutions. They start by noting:

‘the general assumption of equal autonomy, which underlies domestic laws on sexual violence, cannot indiscriminately be transferred to the level of international criminal law’.⁴

I am somewhat dubious of the assertion of ‘equal autonomy’ as (a) an existing feature of domestic laws on sexual violence (in light of my above discussion I think it is safe to say that the Australian justice system is still not convinced of the existence or even the need for equal sexual autonomy) and (b) a not necessarily desirable feature of international law (if we are punishing the rape of an individual what is the purpose if not to redress the violation of their individual autonomy??). However it is their subsequent explanation for why the international and the national must be kept separate that I find particularly intriguing:

When sexual violence is used as a ‘weapon of war’, it differs from the kind of sexual violence usually dealt with in national criminal trials. The ad hoc Tribunals have frequently had to take on situations in which individuals were publicly exposed to acts of sexual violence. Many victims suffered from multiple attacks, sometimes over a prolonged period of time...

...Acts of this kind have usually caused serious bodily injuries and even led to the death of the victim. They can hardly be conceived of ‘merely’ as undesired sex.⁵

⁴ Schomburg Wolfgang and Peterson Ines ‘Genuine Consent to Sexual Violence under International Criminal Law’ (2007) 101(1) *American Journal of International Law* 121 at 126.

⁵ *Ibid* at 127.

The 'Sydney gang rapes' were not committed in the context of war but share many of the features set out by Shomburg and Peterson. Indeed this was recognised by Justice Finnane himself as I just detailed. Herein lies the problem: whilst the criminal justice system may be responding more often and more severely to rape, this can only occur when it is not 'merely' 'undesired sex': terminology which I as a feminist and I am sure many other feminists find deeply troubling. What does 'mere undesired sex' mean? And if in the context of international crimes there will also simultaneously be charges of murder, torture etc, what is the nature of the violation being punished in prosecutions for rape and related sexual/gender-based offences? To answer these questions I will now turn to my international trial example.

International Prosecutions of Violence Against Women: The Special Court for Sierra Leone

Whilst many of the comments I will make regarding international criminal justice could be generalised to other international(ised) tribunals, I will focus today on the SCSL. The reason for this is that, of all the international criminal justice institutions that have operated in recent years, none has been more widely celebrated for its commitment to women survivors of atrocities:

In four of the five indictments, David Crane, the Chief UN Prosecutor, specifically charged crimes of sexual violence. These charges mark a turning point for the women of Sierra Leone, who are gaining both a measure of control over their bodies and a chance to assert control over their own lives through prosecution of such crimes.⁶

In particular, the decision by the SCSL Prosecutor to include previous untried crimes of sexual and gender-based violence was met with enthusiasm by many within the human rights and women's rights communities. Not only

⁶ Eaton, Shana (2004) 'Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime' *Georgetown Journal of International Law*, Vol. 35(4): 873–919 at 908.

were rape and 'other forms of sexual violence' charged but so too sexual slavery and forced marriage.

Again, there is much that can be said about the SCSL and its gender mandate: a topic I am currently writing about and am happy to detail for anyone interested either in question time or at another stage over the next few days. Today, in the interests of time, I will limit my discussion to the 'forced marriage' count.

In order to distinguish forced marriages in the conflict from arranged marriages in peacetime, the SCSL Prosecutor specifically deviated from the international human rights standard and extended the notion of consent to include that of the victim's family. American law professor Michael Scharf and Suzanne Matler were responsible for providing advice to the SCSL Prosecutor on the viability of prosecuting the practice of forced marriage as a new CAH. Their explanation for what is the core of the offence is informative: '...forced marriages demean and distort the institution of marriage itself'.⁷ For Scharf and Mattler what seems to emerge as a central policy reason for prosecuting forced marriage is less about what the women endure in this practice and more about protecting the sanctity of the institution of marriage itself. In an illuminating section of their analysis, they note what they consider to be the detrimental change in status experienced by women in forced marriages:

By virtue of attaching the rights of a spouse to [the victim of forced marriage], her 'husband' traps her within the forced marriage through cultural and social mores in place to protect valid marriages. For example, in Sierra Leone, strong taboos exist regarding victims of rape. A woman who has been raped may be seen as unfit for marriage but if she is 'married' to her rapist, then the sexual violence is deemed a part of the marital relationship and the woman is spared censure.

⁷ Scharf, Michael P. and Mattler, Suzanne (2005) 'Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime against Humanity' *African Perspectives on International Criminal Justice*, Africa Legal Aid Special Book Series at 77.

Scharf and Mattler appear unconcerned by this rather problematic situation for both married and unmarried women who suffer sexual violence and they go on to conclude:

The institution of marriage enjoys protected status because it facilitates the betterment of the individual and of society, objectives that cannot be met in a forced marriage. The international community, therefore, has a clear interest in sending a strong message that forced marriage is an unacceptable perversion of a protected and valued institution, and it, and the threat it poses to the family, will not be tolerated.⁸

Following directly on from their observation that sexual violence within marriage is not only tolerated but normalised in Sierra Leone – and as many feminists have pointed out, elsewhere – Scharf and Mattler's conclusion is deeply troubling. Certainly they seem oblivious to the argument many feminists have made that in fact marriage and the family has *not* always been a source of betterment in the lives of women.⁹ In the words of the UN Special Rapporteur on Violence Against Women:

The family has been traditionally considered as a retreat, a place where individuals are able to find security and shelter. The family has been romanticized as the "private haven" where peace and harmony prevail. Recent research, however, points to the fact that the family

⁸ *Ibid* at 86.

⁹ The literature in this area is too vast to do justice to here but for some classic texts on the issue see Okin, Susan Moller (1989) *Justice, Gender and the Family*; Pateman, Carole (1988) *The Sexual Contract*; Bunch, Charlotte (1995) 'Transforming Human Rights from a Feminist Perspective' in Peters, Julie & Wolper, Andrea (eds.) *Women's rights, human rights: international feminist perspectives*, Routledge, New York, London. Indeed, a critical aspect of the 'women's rights, human rights' campaign throughout the 1990s was to push for a greater recognition within the international human rights framework of the specific human rights violations experienced by women within the 'private' sphere of the home: Binnion, Gayle (1995) 'Human Rights: A Feminist Perspective' *Human Rights Quarterly* Vol.17(3): 509-526.

may be a "cradle of violence" and that females within the home are often subjected to violence in the family.¹⁰

Scharf and Mattler's own observation that women can be raped with impunity within legitimate, state-sanctioned marriages seems to provide a bizarre justification for why the institution of marriage should be protected! What seems to become clear is that the interests being protected in the decision to prosecute forced marriage is not that of gender equality. Sadly this has also been reflected in the SCSL's judicial reasoning on the issue.

Justice Doherty in her partly dissenting judgment disagreed with the majority's categorisation of 'forced marriage' as a form of sexual slavery. In distinguishing the experience of 'bush wives' from other women who experienced sexual and other violence, Her Honour noted: 'The evidence of witnesses shows victims had no protection from rape and were available to any rebel but were not stigmatised as "rebel wives" or "bush wives".'¹¹ Her Honour added, 'I am satisfied that the use of the term "wife" is indicative of forced marital status which had lasting and serious impacts on the victims. I find the label of "wife" to a rebel caused mental trauma, stigmatised the victims and negatively impacted their ability to reintegrate into their communities.'¹² Her Honour, in making this finding, does not address the fact that both the Prosecution's expert witness and some of the victims themselves noted that their experience was preferable to those who did not have the 'protection' of a 'husband'. Nor does Her Honour explain how the stigmatisation or difficulties of reintegration experienced by those who had been 'bush wives' was substantially worse than those who had been abducted, forced to fight, kept as sex slaves or forced labour and/or raped.

In fact various researchers have noted that 'bush wives' in many circumstances fared much better than women who were not associated with a

¹⁰ *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45, E/CN.4/1995/42, at para. 117.*

¹¹ AFRC Trial Chamber Judgment, *Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriage)* at para. 50.

¹² *Ibid* at para. 51.

particular rebel husband.¹³ This is not to suggest that those forced into marriages were not victims, but the emphasis placed on their trauma and stigmatisation risks masking the very similar experiences of trauma, violence and inability to return to traditional communities that other women experienced in the war.¹⁴

Her Honour rather focused on what she understood to be the creation of a 'forced conjugal association'.¹⁵ This approach was subsequently endorsed by the Appeals Chamber, which provided the following definition of 'forced marriage':

...the 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.¹⁶

As Valerie Oosterveld observes, '[t]he Appeals Chamber's reliance on the term "forced" added to "conjugal association" implies that the "conjugal

¹³ Mazurana, Dyan and McKay, Susan (2003) 'Girls in Fighting Forces in Northern Uganda, Sierra Leone, and Mozambique: Policy and Program Recommendations', Canadian International Development Agency's Child Protection Research Fund, June 2003 – available at unddr.org/docs/Girls_in_Fighting_Forces.pdf (last accessed 10/06/2010); Coulter, Chris (2005) 'Female fighters in the Sierra Leone war: challenging the assumptions?' *Feminist Review*, Vol. 88: 54-73; MacDonald, Alice (2008) "'New Wars: Forgotten Warriors": Why Have Girl Fighters Been Excluded from Western Representations of Conflict in Sierra Leone?' *Africa Development*, Vol. XXXIII, No. 3, pp135-145. As Susan McKay notes the roles girls play in fighting forces are frequently highly variable and multi-faceted. She observes, 'some girls in Sierra Leone who were forced to be 'wives' of commanders eventually gained authority within a force': McKay, Susan (2004) 'Reconstructing fragile lives: girls' social reintegration in northern Uganda and Sierra Leone' *Gender and Development*, Vol. 12(3): 19-30 at 22. Moreover the responses of families and communities when they return are highly variable and may involve anything from rituals of welcome and reintegration, targeted violence and forcible marriage (sometimes to the perpetrators of their rapes) or simply shunning or ignoring.

¹⁴ Mazurana and McKay (2003) also note, '[a] girl with a baby and a rebel captor-husband who might potentially marry her according to community customs of marriage can find herself in a more advantageous social position than a girl reintegrating with a baby and no "husband": *ibid* at 27.

¹⁵ AFRC Trial Chamber Judgment, *Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriage)* at para. 53.

¹⁶ Appeals Chamber judgment at para. 196.

association” aspect naturally consists of sex, cooking, cleaning, pregnancy, child-bearing, and child-rearing’.¹⁷ However what Oosterveld does not explain is why she is surprised by this. Indeed, the use of the term ‘marriage’ was in the Prosecution expert witness’ own explanation always a reflection of a patriarchal conception.

Moreover, in her separate opinion in the AFRC case Justice Sebutinde makes an informative distinction between early or arranged marriages in ‘peacetime’ and the practice of ‘forced marriages’ in times of war:

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 under International Humanitarian law. The latter conduct on the other hand, is clearly criminal in nature and is liable to attract prosecution.¹⁸

This distinction was subsequently cited with approval by the Appeals Chamber.¹⁹ Whilst from the perspective of strict legal reasoning this statement may seem appropriate it highlights the problems associated with many feminist/human rights engagements with international criminal justice. The creation of international criminal tribunals such as the ICTR, ICTY, SCSL and the ICC have been heralded as victories for the human rights movement. Moreover, as noted above, there have been many ambitious claims made regarding the contribution these bodies can make to advancing the rights of women. Yet as Justice Sebutinde’s observation clarifies, the ambit of international criminal law is narrow and discrete. It is for this reason I argue that greater caution is needed when advocating for international criminal justice as a panacea for the ongoing and systematic denial of women’s most basic human rights. In many ways this echoes Hilary Charlesworth’s earlier

¹⁷ Oosterveld, Valerie (2009) ‘The Special Court for Sierra Leone’s Consideration of Gender-based Violence: Contributing to Transitional Justice?’ *Human Rights Review*, Vol. 10: 73-98 at 87.

¹⁸ *Separate Concurring Opinion of the Honourable Justice Julia Sebutinde Appended to Judgement Pursuant to Rule 88(C)*, SCSL-2004-16-T, 21 June 2007, para. 12.

¹⁹ SCSL-2004-16-A, 3 March 2008, para. 194.

warnings regarding the crisis focus of international law and its resultant potentially detrimental effect.²⁰

Indeed in some instances the effects of international criminal law responses to violations of women's rights and human rights more broadly may in fact have contradictory results. The express separation of violations of 'human rights norms' such as the Convention on the Elimination of all forms of Discrimination against Women and acts that are 'clearly criminal in nature'²¹ does little to assist with providing 'teeth' to international human rights instruments and standards already plagued by their lack of enforceability. Furthermore, to prosecute the crime of 'forced marriage' in war but to consider the forcible marriage of young women and girls in times of peace a 'rights violation' without any recourse seems perverse. I would imagine this is one of the key reasons why Her Honour needed to assert a distinction between the conduct committed in times of war (sexual slavery) and times of peace (early or arranged marriage). Yet in order to maintain this distinction some troubling assumptions have been incorporated into international jurisprudence.

Again, in an effort to 'gender mainstream' what is actually achieved is a marginalisation of women's experiences from the central accounts of the conflict. Rather than inflecting understandings of what 'forced labour' might mean with a gender perspective – recognising the gendered ways in which this violation may occur – crimes committed against women are set up as separate and incommensurable. In light of what feminists already know about the processes of international justice (and indeed many if not all other domains of power), it seems somewhat naïve to expect that this would not result in either a reinforcement of normalised patriarchal order or the exclusion of women's experiences to the periphery.

Far from empowering women, much of what the SCSL has done in relation to gender has had the reverse effect of distracting from or even

²⁰ Charlesworth, Hilary (2002) 'International Law: A Discipline of Crisis' *The Modern Law Review*, Vol. 65(3): 377-392.

²¹ AFRC Appeals Chamber judgment, para. 194.

delegitimising women's struggles for justice both during and after the conflict. Certainly, when looking at the definition of 'forced marriage' put forward by the Prosecutor and adopted by the Appeals Chamber it becomes debatable whether we have really come that far from wartime sexual violence's traditional characterisation as 'a crime against the family honour or family property'.²²

So What is the Significance of all This?

The overall effect of including violations against women in the international human rights rubric is that women gain power. With this power and newfound voice, women may expand their role outside of the Tribunals, expose issues that have traditionally been subjugated by male power structures, and begin to address the root causes of such violations against them. Providing women with this voice and power is where the Tribunals will truly have the greatest deterrent effect.²³

The aim of this paper is simple: to demand a re-interrogation of the criminal justice system's (both international and national) embracing of the rhetoric of 'women's human rights'. Whilst not wanting to completely dismiss all the efforts of feminist and women's human rights advocates to force the criminal justice system towards a greater recognition of the need to redress traditional impunity for crimes committed against women, I would urge greater caution in prematurely celebrating our victories.

Indeed, by looking at both the 'Sydney gang rape' prosecutions and the SCSL's prosecution of forced marriage, I would argue that many underlying assumptions that have reinforced dominant gender order within the criminal justice system have been left intact. Rather, the endorsement of a 'war'/peace' binary reflects a reconstruction of the traditional public/private

²² Doherty, Justice Theresa A. (2009) 'Developments in the Prosecution of Gender-Based Crimes: A Personal Perspective', Colloquium on Sexual Violence as an International Crime, The Grotius Centre, The Hague, Netherlands, 16-18 June 2009, at 2 – available at www.grotiuscentre.org/files/SexualViolence-speechDoherty.pdf (last accessed 10/06/2010).

²³ Eaton (2004) *supra* note 6 at 906.

dichotomy that has been so problematic for women. Moreover, when looking at how the nature of the violation is characterised it becomes clear that even those decisions and decision-makers that have been praised for their 'gender sensitivity' have in fact moved very little away from the classic characterisation of sexual and gender-based violence as violations of honour and family. Increased attention and even censure by the criminal justice system has not resulted in women victims' voices emerging as more audible.

Rather than heralding a new recognition of women as rights-bearing individuals, the symbolic significance of women's bodies remains as central as ever to the criminal justice system's response to gender-based violence.