

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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AMICUS CURIAE BRIEF ON FORCED MARRIAGE

Filed by:

Dr. Annie Bunting, York University,
 Canada, on behalf of “Conjugal Slavery in
 War: Partnerships for the study of
 enslavement, marriage and masculinities”

Dr. Izevbuwa Kehinde Ikhimiukor, York
 University, Canada

Dr. Luke Moffett, Queen’s University
 Belfast, United Kingdom

Dr. Joel Quirk, University of
 Witwatersrand, South Africa

Before:**Trial Chamber**

Judge NIL Nonn, President

Judge YOU Ottara

Judge YA Sokhan

Judge Jean-Marc LAVERGNE

Judge Claudia FENZ

Distribution to:

Office of the Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN
SENG Bunkheang
William SMITH

The Accused:

KHIEU Samphan
NUON Chea

Co-Lawyers for the Defence:

SON Arun
Victor KOPPE

KONG Sam Onn
Anta GUISSÉ

Lead Co-Lawyers for Civil Parties

PICH Ang
Marie GUIRAUD

INTRODUCTION

1. This Brief, filed by the Applicants as *amicus curiae* in Case 002/02 before the Extraordinary Chambers in the Courts of Cambodia (ECCC), addresses the issue of forced marriage as a crime against humanity of “other inhumane acts” as charged against the defendants in the indictment in Case 002/02.¹ On 14 June 2016, the Applicants requested leave from the Trial Chamber to be admitted as *amicus curiae* in Case 002/02² and on 13 September 2016, this request was granted.³ The ECCC’s decision granting the request of the Applicants to file *amicus curiae* brief delineates the scope of the Brief. Accordingly, the Brief is limited to:

- (1) The legal characterisation of forced marriage as a crime against humanity of “other inhumane acts”, in relation to the acts that occurred from 1975 to 1979 in Cambodia; and
- (2) the evolution of forced marriage as a crime as well as the legal and factual distinction between arranged marriage in peace time and forced marriage under oppressive regimes or in conflict situations.⁴

2. The above listed issues are addressed seriatim in this Brief. The introduction provides a brief overview of the factual events as contained in records and testimonies before the ECCC. Part I examines the legal characterisation of forced marriage as a crime against humanity before the ECCC in relation to the acts that occurred from 1975 to 1979 in Cambodia. Part II provides an overview of the evolution of forced marriage. It also examines the legal and factual distinction between arranged marriage in peace time and forced marriage under oppressive regimes or in conflict situations. The Applicants rely on more than 250 interviews with survivors of forced marriage in conflict situations to provide comparative, contextual analysis. The discussion in this part draws heavily from the jurisprudence of international criminal courts and tribunals that have or are currently addressing forced marriage and related issues. An overview of the existing academic commentary on the characterisation and treatment of forced marriage as a crime against humanity by the Special Court for Sierra Leone (SCSL) is also undertaken in this part.

¹ Office of the Co-Investigating Judges, Closing Order, 15 September 2010, Case No. 002/19-09-2007-ECCC-OCIJ, D427 [Closing Order].

² Request for Leave to Submit *Amicus Curiae* Brief on Forced Marriage, 14 June 2016, Case No. 002/19-09-2007-ECCC/TC. E418.

³ Trial Chamber, Decision on the Request for Leave to Submit *Amicus Curiae* Brief on Forced Marriage, 13 September 2016, Case No. 002/19-09-2007/ECCC/TC. E418/3.

⁴ *Ibid.*, para 8.

3. The alleged facts, which if proven demonstrate the occurrence and widespread nature of forced marriages under the rule of the Communist Party of Kampuchea (CPK), are included in testimonies and accounts of witnesses and civil parties before the ECCC.⁵ The factual accounts before the ECCC allege that the CPK as early as 17 April 1975 or prior to that date in areas where it exercised control and until 6 January 1979 implemented a policy of forcing people into marriages.⁶ There are a number of testimonies and accounts from witnesses and civil parties before the ECCC that provides an insight into the regulation of marriage under the Khmer Rouge regime from 1975 up until 1979.

I. LEGAL CHARACTERISATION OF FORCED MARRIAGE BEFORE THE ECCC

1.1. Forced Marriage as “Other Inhumane Acts”

4. The Enabling Law of the ECCC like other international criminal courts and tribunals does not contain any provision on forced marriage. Forced marriage has been charged as crimes against humanity of “other inhumane acts” under Article 5 of the ECCC Law.⁷ Since crimes against humanity were first codified as an offence under article 6(c) of the Nuremberg Charter,⁸ the phrase “other inhumane acts” has been part of its provisions as a residual clause to cover other forms of crimes against humanity not specifically elaborated. Subsequent international criminal tribunals and courts established after the Nuremberg Tribunal have adopted this practice.⁹

5. Over the years, a range of acts and omissions have been recognized as crimes against humanity of “other inhumane acts” by the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), SCSL and the International Criminal Court (ICC). Some of the acts recognised as crimes against humanity of “other inhumane acts” include: sexual violence to a dead woman’s body;¹⁰ sexual violence;¹¹ “mutilation and other types of severe bodily harm, beatings and other acts of violence”¹² and

⁵ Closing Order, paras 216-220, 741, 842, 844-846, 849-850, 854, 856 and 858-859.

⁶ *Ibid*, paras. 157-158.

⁷ Law on the establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

⁸ *United Nations, Charter of the International Military Tribunal- Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* (“London Agreement”), 8 August 1945.

⁹ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed (Kluwer Law International, 1999) p. 330-368.

¹⁰ *The Prosecutor v Eliezer Niyitegeka*, Case No. ICTR-96-14-T (16 May 2003), para. 465.

¹¹ *The Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, (2 September 1998), paras. 688 and 693[Akayesu Trial Judgment].

¹² *The Prosecutor v Kvočka and others*, Case No. IT-98-30/1-A (28 February 2005), para. 435.

more recently forced marriage by the SCSL in *Prosecutor v. Brima, Kamara & Kanu (AFRC case)*¹³ and *Prosecutor v. Sesay, Kallon & Gbao (RUF case)*.¹⁴ We respectfully submit that the jurisprudence of other international criminal courts and tribunals, while not binding on the Trial Chamber, may be instructive to the Court in interpreting “other inhumane acts” of forced marriage. As the Chamber considers the elements of the crime and the evidence before it, this jurisprudence and academic commentary may be informative for the Chamber.

1.2 The Legality of Charging Forced Marriage as a Crime Against Humanity before the ECCC for Acts Which Occurred from 1975 to 1979

6. Since the Nuremberg Trials first addressed the principle of *nullum crimen sine lege*, it has become embodied in trials both at domestic and international levels.¹⁵ The principle of *nullum crimen sine lege* (otherwise referred to as the principle of legality) is enshrined in Article 11 of the *Universal Declaration of Human Rights*.¹⁶ It prohibits persons from being held accountable for acts or omissions which did not constitute a crime either under national or international law at the time they occurred. International criminal courts and tribunals have adopted a less strict application of the principle of legality by allowing prosecution of crimes which are not created in specific treaties or text but are based on customary international law.¹⁷ International criminal law has earned criticisms for the adoption of a less formal adherence to the principle of legality.¹⁸ It is, however, inconceivable that all acts which may be characterised as crimes against humanity will be specifically set out in treaties and texts. This point is re-emphasised by the range of acts

¹³ *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-A, Appeals Chamber Judgment (22 February 2008) para. 200[AFRC Appeal Judgment].

¹⁴ *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Judgment, (2 March 2009) paras. 1464 and 1473[RUF Trial Judgment].

¹⁵ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2009) p. 67-155, for an overview of post Nuremberg and war prosecutions treatment of the principle of legality [Gallant, the Principle of Legality].

¹⁶ *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), UN Doc. A/810 (10 Dec 1948).

¹⁷ In *Prosecutor v. Tadic*, Decision on the Defence Motion on Interlocutory Appeal on Jurisdiction, Case No IT-94-1 ICTY App. Ch, (2 October 1995), the Court noted that “[i]t should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege*.”

¹⁸ Gallant, *The Principle of Legality* p. 374-375.

international criminal courts and tribunals have over the years recognised as crimes against humanity.¹⁹

7. In *Prosecutor v. Zejnil Delalic*,²⁰ the Appeals Chamber of the ICTY affirming the decision of the Trial Chamber on the issue of legality stated that:

It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to “general principles of law” recognised by all legal systems. Hence the caveat, contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.²¹

The above excerpt provides that if the acts or omissions can be shown to be criminal irrespective of whether they are codified or not, persons cannot allege violation of breach of *nullum crimen sine lege*. Further, the ECCC has held “other inhumane acts” to be an established crime under international law prior to 1975 that was both accessible and foreseeable to persons indicted by the Court.²² In addition, the Trial Chamber reiterating the decision of the Pre-Trial Chamber, has held that because “other inhumane acts” is a distinct crime under international law, it is not necessary to prove that the different constituent acts which fall within the purview of this crime were recognised as crimes because the principle of legality is applicable only to the crime of “other inhumane acts” and not the different sub-categories.²³

¹⁹ See the discussion in paragraph 5.

²⁰ *Prosecutor v. Delalic*, Case No. IT-96-21-A, (20 February 2001) Appeals Chamber Judgment.

²¹ *Ibid.*, para. 179 citing Trial Judgment para. 313.

²² Trial Chamber Case 002/01 Judgment, 7 August 2014, Case No. 002/19-09-2007/ECCC/TC, E313, para.435 [Trial Chamber Case 002/01 Judgment].

²³ *Ibid.*, para. 436 citing Pre-Trial Chamber Decision on IENG SARY Appeal against the Closing Order, D427/1/30, 11 April 2011, paras. 371, 378; Pre-Trial Chamber Decision on Appeal by NUON Chea and IENG Thirith against the Closing Order, D427/3/15, 15 February 2011, para. 156.

1.3. Twin Tests of Accessibility and Foreseeability and Forced Marriage before the ECCC

8. The genesis of an acknowledgment in international law that marriage should be regulated was brought about by the recognition that ‘marriage’ could be utilised as a means of enslavement.²⁴ Thus the first prescription of marriage in international law took place sixty years ago via the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery to which Cambodia acceded to on 12 June 1957.²⁵ That instrument, under its Article 2, requires States Parties to “prescribe, where appropriate suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages”.²⁶

9. While the 1956 Supplementary Convention is meant to address specific instances of servile marriage – that is bride purchase, transfer of a wife, and the inheritance of a widow – the provisions of Article 2 are more general in scope. Yet, the scope of the provision of Article 2, while requiring States to address minimum age of marriage and encourage the registration of marriage, did not envision that a ‘competent civil authority’ would, as in the case of the CPK, act not to ensure that free consent was given, but rather that they acted as the agent of coercion in a forced marriage. The anomaly of forced marriage in the context of the CPK, was both beyond the imagination of negotiators of the 1956 Supplementary Convention and, we would submit, in dire opposition to its provisions.

10. It might be emphasised that those conventional servitudes found in the 1956 Supplementary Convention - those institutions and practices similar to slavery – including servile marriages, could also constitute slavery if they are “covered by the definition of slavery contained in the

²⁴ Consider the following statement by the French Representative during the negotiations of the 1956 Supplementary Convention: “Marriage might be the last refuge of slavery and did not necessarily represent its mildest form”, United Nations, Economic and Social Council, Committee on the Drafting of a Supplementary Convention on Slavery and Servitude, Summary Record of the Thirteenth Meeting, 25 January 1956, UN Doc. E/AC.43/SR.13, 27 February 1956, p.6; as found in Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff, 2008), p. 335.

²⁵ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, UNTS, Vol. 266, Article 1. For Cambodia’s consent to the Supplementary Convention see: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII-4&chapter=18&Temp=mtdsg3&clang=en

²⁶ *Ibid.*

slavery convention”.²⁷ As such, it is open to this Trial Chamber, in the alternative, to make a determination that these forced marriages constituted, through the acts of the CPK, *the exercise of any or all of the powers attaching to the right of ownership* and thus fall under the heading of enslavement.²⁸ If the Trial Chamber were to make such a determination, reference to the 2012 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery provide a means of interpreting the internationally established definition of slavery qua enslavement in a manner which is internally consistent with the definition’s property paradigm while capturing the lived experience of those enslaved both *de jure*, but also *de facto*.²⁹

11. Aside from the 1956 Slavery Convention to which Cambodia acceded to in 1957, there are also several international human rights instruments which provides that marriage must be entered into with the full and free consent of the parties.³⁰ These instruments are easily accessible and as of 1975, most of the instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages were in force.³¹

12. Forced marriage was characterised and prosecuted before the SCSL as a distinct crime encapsulating a variety of both sexual and non-sexual acts which in themselves are criminal and may be regarded as crimes against humanity. Some of the distinct components of forced marriage are sexual slavery, enslavement, forced labour, rape and forced pregnancy committed in a systematic and/ or widespread manner; the ECCC has upheld the legality of some of these

²⁷ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, UNTS, Vol. 266, Article 1.

²⁸ Consider the chapter entitled “Forced Marriage: Slavery Qua Enslavement and the Civil War in Sierra Leone” in Jean Allain, *Slavery in International Law : Of Human Exploitation and Trafficking*, (Martinus Nijhoff, 2013), p. 293-324, available at <http://go.qub.ac.uk/Wgdb> [Jean Allain, *Slavery in International Law*].

²⁹ See Jean Allain and Robin Hickey, “Property Law and the Definition of Slavery”, *International and Comparative Law Quarterly* (2012) Volume 61, 915-938; and more generally Jean Allain (ed.) *The Legal Understanding of Slavery: From the Historical to the Contemporary*, (Oxford University Press, 2012) and Jean Allain, *Slavery in International Law*. For the 2012 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery, see <http://www.worlddialogue.org/content.php?id=530>

³⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 16(1) - (2); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS, Vol. 993, Article 10(1); *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS, Vol. 999, Article 23(3); *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, UNTS, Vol. 1249, Article 16(1)(b); *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 10 December 1962, UNTS, Vol. 521, Article 1(1).

³¹ *Ibid.*

underlying offences of forced marriage.³² The ECCC in *Case 002/02* has so far endorsed the legal characterisation in the indictments of forced marriage as a crime against humanity of “other inhumane acts” consistent with the approach of the SCSL in the *AFRC case*.

1.4 The Elements of Forced Marriage

13. The fact that forced marriage is not specifically codified as a distinct crime in international criminal law has in certain instances led to its conflation with other gender based crimes particularly, sexual slavery. The Appeals Chamber of the SCSL in the *AFRC case* described forced marriage thus:

... forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or physical or mental injury on the part of the victim.³³

14. Aside from providing a contextual definition of forced marriage, the Appeals Chamber in the *AFRC case* also set out four requirements which acts or omissions must satisfy before being characterised as crimes against humanity of “other inhumane acts”. The acts or omissions must inflict great suffering, or serious injury to body or to mental or physical health; the acts or omissions must be sufficiently similar in gravity to the other acts of crimes against humanity enumerated in the statute; the perpetrator must be aware of the factual circumstances that established the character of the gravity of the act; and finally, the acts or omissions must satisfy the general chapeau requirements of crimes against humanity.³⁴

II. THE EVOLUTION OF FORCED MARRIAGE AS AN INTERNATIONAL CRIME

15. Despite the 1956 Supplementary Convention on slavery, international criminal law did not address forced marriage directly even in the face of evidence of its widespread occurrence in several conflict situations.³⁵ Thus, the Statutes of the International Criminal Tribunal for the

³² Trial Chamber *Case 002/01* Judgment, 7 August 2014, Case No. 002/19-09-2007/ECCC/TC, E313, para. 176 [Trial Chamber *Case 002/01* Judgment]; Trial Chamber, *Case 001* Judgment, 26 July 2010, Case No. 001/18-07-2007/ECCC/TC, E188, paras. 283-296 [Trial Chamber, *Case 001* Judgment]; Supreme Court Chamber, *Case 001*, Case No. 001/18-07-2007-ECCC/SC, Doc. No. F28, paras. 89-104.

³³ *AFRC Appeals Judgment*, para. 195.

³⁴ *Ibid.*, para. 198.

³⁵ Monika Satya Kalra, ‘Forced Marriage: Rwanda’s Secret Revealed’, (2001) 7 University of California, Davis Journal of international Law and Policy 197, 202, 203, Kalra criticises the Office of the Prosecutor of the ICTR for

Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the ECCC and the International Criminal Court (ICC) did not provide specifically for the criminalisation of forced marriage as a distinct crime under international criminal law. And in proceedings before the ICTY, incidences of the abduction, rape and enforced domestic labour of women and girls were characterised as enslavement and rape.³⁶ This relative silence of international criminal law on the issue of forced marriage would change in 2008 following the decision of the Appeals Chamber of the SCSL. The decisions from the SCSL, we submit, may be of interpretative value to this Trial Chamber as it applies the crime against humanity of “other inhumane act”.

2.1. Characterisation and Treatment of Forced Marriage by the SCSL

16. On 22 February 2008 the SCSL became the first international criminal tribunal to recognize forced marriage as a distinct crime against inhumanity of “other inhumane acts” when it made public its decision in the *AFRC case*.³⁷ The SCSL Appeals Chamber characterised forced marriage as a crime against humanity of “other inhumane acts” and rejected the decision of the Trial Chamber in the *AFRC case* which had held that forced marriage was subsumed within the crime of sexual slavery.³⁸ The Appeals Chamber noted that the Trial Chamber erred when it adopted a restrictive interpretation of article 2(i) of the Statute of the SCSL. It also expressed the view that it saw no reason why the “so-called exhaustive listing of sexual crimes under article 2(g) of the Statute” of the SCSL should preclude the charging of other crimes with a sexual component as crimes against humanity of “other inhumane acts”. The Appeals Chamber thus decided that the Trial Chamber was in error when it held that Article 2(i) of the Statute excluded sexual crimes.³⁹

failing to charge forced marriage as a crime of sexual violence; see also, Human Rights Watch *Shattered Lives Sexual Violence during the Rwandan Genocide and its Aftermath*, 1996 p. 56-62.

³⁶ *Prosecutor v. Kunarac*, Case No. IT-96-23-T (22 February 2001) [Kunarac Trial Judgment] paras. 254, 255, 256, 728, 741, 742. In this case, the Court held the abduction, rape, confinement and enforced domestic chores of victims who had not been labelled as wives as enslavement.

³⁷ *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-A, Appeals Chamber Judgment (22 February 2008) [AFRC Appeals Judgment].

³⁸ Judgment, Brima, Kamara, and Kanu (SCSL-04-16-T), Trial Chamber II, 20 June 2007, paras. 703, 713; see also the Partly Dissenting Judgment of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages) appended to the judgment.

³⁹ AFRC Appeals Chamber Judgment, paras. 185-186

17. The Trial Chamber in the *RUF case*, in addition to affirming the definition and legal characterisation of forced marriage in the *AFRC case*, identified the physical and mental elements of forced marriage as the imposition of forced conjugal association⁴⁰ and the perpetrator's awareness of the grave suffering and serious injury his imposition of forced conjugal association caused the victims respectively.⁴¹ The Trial Chamber noted that the perpetrators used forced marriage as a means of destroying family ties and long held cultural values⁴² and spreading terror.⁴³ As noted by the Trial Chamber in the aftermath of the crimes, victims suffered stigmatization, physical and psychological pain and were ostracized from their communities leading to women being abandoned by their husbands and young girls unable to marry within the community. The Trial Chamber found that the rebels label of the victims as "wife" was a ploy to deliberately and strategically enslave and psychologically manipulate the victims.⁴⁴

18. The SCSL's Trial Chamber, departed from this approach in the later case of *Prosecutor v. Taylor, (Taylor's case)*.⁴⁵ In that case, the Trial Chamber expressed the view that the title forced marriage given to the forced conjugal association imposed on women and girls during the conflict was a "misnomer" as no actual marriage had taken place. In addition, the Trial Chamber went on to outline the elements of forced conjugal association as sexual slavery and forced labour.⁴⁶ The Trial Chamber introduced a new term "conjugal slavery" as best describing the experiences of women and girls during the conflict.⁴⁷ The Trial Chamber, however, wrestled with setting out the terms and parameters of conjugal slavery as it tried to box both the sexual and non-sexual elements of conjugal slavery into sexual slavery.⁴⁸ Thus, the Trial Chamber stated:

...that conjugal slavery is better conceptualized as a distinctive form of the crime of sexual slavery, with the additional component described by the Appeals Chamber [in *AFRC case*]. However, the Trial Chamber is of

⁴⁰ RUF Trial Judgment, para. 1295.

⁴¹ *Ibid.*, para. 1296.

⁴² *Ibid.*, Judgment para. 1349.

⁴³ *Ibid.*, para. 1351.

⁴⁴ *Ibid.*, para. 1466.

⁴⁵ *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Trial Chamber II, Judgment (18 May 2012) [Charles Taylor Trial Judgment].

⁴⁶ *Ibid.*, paras. 425-426.

⁴⁷ *Ibid.*, paras. 428.

⁴⁸ *Ibid.*, paras. 429- 430.

the view that this additional component, which relates to forced conjugal labour, is simply a descriptive component of a distinctive form of sexual slavery.⁴⁹

2.2. Academic Commentary on the Treatment of Forced Marriage by the SCSL

19. The treatment of forced marriage by the SCSL stimulated a varied response which continues to resonate and is the subject of burgeoning academic literature and commentaries.⁵⁰ The legal characterisation of forced marriage as a crime against humanity of “other inhumane acts” has found support amongst commentators in several academic writings. One reason advanced is that forced marriage is a multi-layered crime, with several constituent crimes such as forced labour, enslavement, rape and forced pregnancy, all distinct acts of crimes against humanity which are not on their own reflective of the harm victims of forced marriage suffer.⁵¹ Several commentators such as James Clark,⁵² Neha Jain,⁵³ Amy Palmer⁵⁴, Micaela Frulli,⁵⁵ and Krista Stout⁵⁶ have iterated the need to criminalize forced marriage as a crime distinct from the constituent crimes, which they all agree do not embody the essence of the crime of forced

⁴⁹ *Ibid.*, para. 429.

⁵⁰ Valerie Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties’, (2011) 2 International Humanitarian Legal Studies 127-158[Valerie Oosterveld, Forced Marriage]; Micaela Frulli, ‘Advancing International Criminal Law’ (2008) 6 Journal of International Criminal Justice 1033[Micaela Frulli, Advancing International Criminal Law]; Bridgette Toy-Cronin, ‘What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime against Humanity’, (2010) 19(2) Columbia Journal of Gender & Law, 539[Bridgette Toy-Cronin, What is Forced Marriage]; Neha Jain, ‘Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution’, (2008) 6 Journal of International Criminal Justice 1013[Neha Jain, Forced Marriage as a Crime Against Humanity] and Annie Bunting, ‘“Forced Marriage” in Conflict Situations: Researching and Prosecuting Old harms and New Crimes’, (2012) 1 Canadian Journal of Human Rights 165[Annie Bunting Forced Marriage in Conflict Situations].

⁵¹ Michael P. Scharf and Suzanne Mattler, ‘Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone’s New Crime Against Humanity’, Case Research Paper Series in Legal Studies Working Paper-05-35 October 2005, p.7-8; Micaela Frulli, Advancing International Criminal Law 1033; Rachel Slater, ‘Gender Violence or Violence Against Women? The Treatment of Forced Marriage in The Special Court for Sierra Leone’, (2012) 13 Melbourne. Journal of International Law 732 rejects the calls for forced marriage to be viewed as enslavement or sexual slavery and emphasises the gender specific nature in relation to roles and harm suffered from the label of a wife.

⁵² James Clark, ‘Forced Marriage: The Evolution of a New International Criminal Norm’ (2012) 3 Aberdeen Student Law Review 4, 12.

⁵³ Neha Jain, Forced Marriage as a Crime against Humanity 1030.

⁵⁴ Amy Palmer, ‘An Evolutionary Analysis of Gender-Based War Crimes and The Continued Tolerance of Forced Marriage’, (2009)7 Northwestern Journal of International Human Rights, 133, 159.

⁵⁵ Micaela Frulli, Advancing International Criminal Law, 1036.

⁵⁶ Krista Stout, ‘What’s in a Name? The Feasibility and Desirability of Naming Forced Marriage as a Separate Crime Under International Humanitarian Law’, (2010) 19 Dalhousie Journal of Legal Studies 1.

marriage. Bridgette Toy- Cronin⁵⁷ adopts a more nuanced approach to forced marriage as a crime against humanity of “other inhumane acts”. She advocates for forced marriage as a crime to be confined to the imposition of the status of marriage while other criminal acts such as rape, sexual slavery or torture be prosecuted separately. Adopting this approach, she argues, will ensure that the perpetrators’ criminal acts are not protected by the purported marriage.⁵⁸

20. At the same time, several criticisms have been levelled against the treatment of forced marriage by the SCSL particularly, in the *AFRC Case*. Azadi Goodfellow⁵⁹ criticises the SCSL Appeals Chamber in the *AFRC Case* for violating the principle of legality and finding the defendants guilty of forced marriage. He criticises the SCSL for paying insufficient attention to the question of the legality of forced marriage and finds the reasons provided by the SCSL in paragraph 197 of the judgment as unsatisfactory and wrong.⁶⁰ Jennifer Gong-Gershowitz⁶¹ criticises the naming of the ‘bush wives practice’ as forced marriage in Sierra Leone because no actual marriage took place.⁶² This is a view shared by many, as the factual accounts of the “bush wives’ phenomenon” in Sierra Leone do not reveal any marriages between the rebels and the victims that would be recognised by customary law or civil law. She also believes that the naming of forced marriage as a crime against humanity of other inhumane acts has the tendency of “minimizing the sexual violence and enslavement that were the principal features of forced marriages in the Sierra Leone conflict”.⁶³

21. In 2011, this group of researchers and non-governmental organizations working with survivors of wartime forced marriages in African conflicts met for an international conference in Sierra Leone. The “Freetown Communiqué” arising from this conference argues “that ‘forced marriage’ has enduring harsh consequences for women and their children born in captivity and after; [...] and that practises referred to as ‘forced marriage’ be charged as enslavement in

⁵⁷ B. A. Toy-Cronin, ‘What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime against Humanity’, (2010) 19(2) Colum. J. Gender & L. 539.

⁵⁸ *Ibid.*, p. 578.

⁵⁹ Nicholas Azadi Goodfellow, ‘The Miscategorization of ‘Forced marriage’ as a Crime Against Humanity by the Special Court for Sierra Leone’, (2011) 11 International Criminal Law Review 831.

⁶⁰ *Ibid.*, 831, 837, 838, 866 .

⁶¹ Jennifer Gong- Gershowitz, ‘Forced Marriage: A “New” Crime Against Humanity?’ (2009) 8 Northwestern Journal of International Human Rights 60.

⁶² *Ibid.*, 65-66.

⁶³ *Ibid.*, 54.

international law”.⁶⁴ The position adopted in the Freetown Communiqué has also been espoused by other commentators such as Patricia Sellers⁶⁵ and Iris Haenen⁶⁶ who have called for practices characterised as forced marriage in Sierra Leone and other African states to be charged as enslavement. This position also finds contextual support in our qualitative research with 50 survivors of wartime abduction in Sierra Leone in 2013 (11 years after the end of the conflict), in which the range of captivity was between two months and eleven years.⁶⁷ They all report being raped immediately after abduction, taken as ‘rebel wives’, and almost 90% of the survivors became pregnant (some more than once).⁶⁸ Similarly, the results of our interviews with 48 survivors of abduction and enslavement as ‘forced wives’ with the Lord’s Resistance Army (LRA) found that 37 of 48 had spent more than a year in LRA captivity.⁶⁹

2.3. Treatment of Forced Marriage by the International Criminal Court (ICC)

22. The Rome Statute of the ICC, like the statutes of previous international criminal tribunals and courts, has not specifically criminalised the crime of forced marriage but in several of the cases before the ICC, there have been reports of forcible abduction, continued rape, forced domestic chores and the imposition of marital status on women and young girls. In each of the cases of *Prosecutor v. Thomas Lubanga Dyilo (Lubanga’s case)*⁷⁰, *Prosecutor v. Germain Katanga (Katanga’s case)*⁷¹ and *Prosecutor v. Dominic Ongwen (Dominic Ongwen’s case)*⁷², evidence of the practice of forced marriage has been presented before the ICC. The ICC in addressing the issue of forced marriage in its jurisprudence has adopted two different legal characterisations.

⁶⁴ Communiqué, International Conference on Forced Marriage in Conflict Situations, Freetown, Sierra Leone, Feb. 24-26, 2011 (on file with A. Bunting).

⁶⁵ Patricia Viseur Sellers, ‘Wartime Female Slavery: Enslavement’, (2011) 44 Cornell International Law Journal 115.

⁶⁶ Iris Haenen ‘The Parameters of Enslavement and the Act of Forced Marriage’ (2013) 13 International Criminal Law Review 895-915.

⁶⁷ Conjugal Slavery in War (CSiW) Partnership, Interviews 2013, transcripts on file with A. Bunting.

⁶⁸ Sierra Leone country report, CSiW Partnership, 2016 on file with A. Bunting.

⁶⁹ Uganda country report, CSiW Partnership, 2016 on file with A. Bunting.

⁷⁰ Situation in the Democratic Republic of the Congo in the Case of *Prosecutor v. Thomas Lubanga Dyilo* [Lubanga’s case], ICC-01/04-01/06, 14 March 2012, para 629.

⁷¹ *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Germain Katanga* ICC-01/04-01/07 (7 March 2014) paras 958-960; Katanga and Ngudjolo Chui Decision on the Confirmation of Charges [Katanga Decision on Confirmation of Charges].

⁷² *The Prosecutor v Dominic Ongwen*, Decision on the Confirmation of Charges, ICC-02/04-01/15 (23 March 2016), para. 91 [*Prosecutor v Dominic Ongwen*, Decision on the Confirmation of Charges].

23. In the *Lubanga case*, neither forced marriage nor sexual slavery were specifically charged as counts in the indictment. The evidence of sexual violence and practices of forced marriage were heard in the context of considering the charge of recruiting children to fight in the hostilities. The Trial Chamber's characterisation of gender-based violence as sexual slavery in *Lubanga's case* is distilled from the views it expressed on the evidence of sexual violence, in particular against young women and girls, including practices of forced marriage that had been heard in the case.⁷³

24. In the *Katanga case*, the Pre-Trial Chamber used evidence of forced marriage as proof of sexual slavery and this is reflected in the decision of the Pre-Trial Chamber when it stated that, "sexual slavery also includes situations where women and girls are forced into 'marriage', domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors".⁷⁴ The Pre-Trial Chamber went on to list the different types of sexual slavery as "practices such as the detention of women in 'rape camps' or 'comfort stations', forced temporary 'marriages' to soldiers and other practices involving the treatment of women as chattel, and as such, violations of peremptory norm prohibiting slavery".⁷⁵

25. In *Prosecutor v. Dominic Ongwen*⁷⁶ the ICC, for the first time, indicted an accused for acts of forced marriage as a crime against humanity of "other inhumane acts" following the jurisprudence of the SCSL in the *AFRC* and *RUF cases* and a departure from the ICC's previous treatment of forced marriage in both *Lubanga* and *Katanga's cases*. Dominic Ongwen is being charged for several counts of sexual and gender based crimes of rape, enslavement, torture, sexual slavery and forced marriage as part of the catalogue of crimes committed by the Lord's Resistance Army (LRA) in Uganda.⁷⁷ The Pre-Trial Chamber of the ICC confirmed the charges

⁷³ Situation in the Democratic Republic of the Congo in the Case of *Prosecutor v. Thomas Lubanga Dyilo* [Lubanga's Case], ICC-01/04-01/06, 14 March 2012, para. 629: "Not only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step."

⁷⁴ *Katanga and Ngudjolo Chui* Decision on the Confirmation of Charges, para 431.

⁷⁵ *Ibid.*

⁷⁶ *The Prosecutor v Dominic Ongwen*, Decision on the Confirmation of Charges, ICC-02/04-01/15 (23 March 2016), para. 91 [*Prosecutor v Dominic Ongwen*, Decision on the Confirmation of Charges].

⁷⁷ Situation in Uganda *The Prosecutor v. Dominic Ongwen* ICC-02/04-01/15 Case Information Sheet ICC-PIDS-CIS-UGA-02-009/16_Eng updated 10 February 2016 ; See also, *The Prosecutor v Dominic Ongwen* ICC-02/04-01/15-T-21-Red-ENGWT 22-01-2016 1-86 SZ PT Pre-Trial Chamber II Transcripts of Confirmation of Hearing 22/01/2016 at 7; Situation in Uganda *The Prosecutor v Dominic Ongwen* ICC-02/04-01/15, Annex A Public redacted version of the Prosecution's submission of the documents containing the charges, the pre-confirmation brief, and the list of evidence of 22 December 2015 at para. 134.

against Dominic Ongwen on 23 March 2016. Following the confirmation of charges, the case has been scheduled for trial on 6 December 2016.

26. There are parallels with the ICC Pre-Trial Chamber's description of forced marriage in the *Ongwen* case and in the *AFRC case*.⁷⁸ The prosecutor, in laying out the facts which characterise forced marriage in Uganda, describes a situation where women were abducted, raped, enslaved and forced to become exclusive conjugal partners.⁷⁹ The ICC Pre-Trial Chamber in the Confirmation of Charges Decision, held that "forcing another person to serve as a conjugal partner may, *per se*, amount to an act of a similar character to those explicitly enumerated by article 7(1) of the Statute and may intentionally cause great suffering, and that forced marriage may, in the abstract, qualify as 'other inhumane acts' under article 7 of the Statute rather than being subsumed by the crime of sexual slavery."⁸⁰ Implicit in the description of forced marriage given above, is the distinction between forced marriage and sexual slavery on the one hand and all other crimes against humanity listed in article 7(1) which have certain shared characteristics with forced marriage.⁸¹

27. The ICC Pre-Trial Chamber further distinguishes forced marriage from sexual slavery by outlining the core element of forced marriage to be the imposition of marital status on the victim. Embedded within the imposition of marital status is a relationship of exclusivity which the Pre-Trial Chamber opines is absent in other crimes with which the accused has been charged. The Pre-Trial Chamber further distinguishes forced marriage from other crimes by highlighting the unique harm stemming from the violations of the rights of victims to freely and fully consent to marriage and establishing a family. This harm, the Pre-Trial Chamber notes, is distinct from any "physical, sexual integrity or personal liberty" which may result from other sexual and non-sexual based crimes as rape, sexual slavery or enslavement.⁸²

2.4. The Distinction between Forced Marriage and Arranged Marriage

28. Two words which stand out in witness and civil parties' testimonies and accounts allegedly describing the regulation of marriage under the Khmer Rouge regime from 1975 to 1979 are

⁷⁸ *Prosecutor v Dominic Ongwen*, Decision on the Confirmation of Charges, para. 89.

⁷⁹ *The Prosecutor v Dominic Ongwen* ICC-02/04-01/15-T-21-Red-ENGWT 22-01-2016 1-86 SZ PT Pre-Trial Chamber II Transcripts of Confirmation of Hearing 22/01/2016 at 29-34, 36, 40-41

⁸⁰ *The Prosecutor v Dominic Ongwen* para. 91.

⁸¹ *Ibid.*, para 92.

⁸² *Ibid.*, paras. 94-95.

“forced” and “arranged”. In testimonies of witnesses and civil parties before the ECCC, there are repeated references to the word “arranged” used in describing their marriages.⁸³ The use of the word “arranged” ought to be read, we would submit, in the context with other words such as “forced” in charting the narratives and experiences of witnesses, victims and civil parties. During the Khmer Rouge regime, evidence indicates that the local Khmer Rouge officers conducted a large number of official proceedings between couples.⁸⁴

29. To avoid a conflation between forced marriage and arranged marriage, it is apt to draw a distinction between them. The distinction between forced marriage and arranged marriage has been drawn under both domestic and international criminal law. Within the United Kingdom’s domestic legal system, Wilson LJ in *[R (On the application of Quila and another) (FC)(Respondents) v Secretary of State for the Home Department (Appellant)]*,⁸⁵ drew the distinction between forced marriage and arranged marriage in the following words:

A forced marriage is a marriage into which one party enters not only without her or his free and full consent but also as a result of force including coercion by threats or by other psychological means: ... A forced marriage is entirely different from an arranged marriage in which in conformity with their cultural expectations, two persons consent to marry each other pursuant to an arrangement negotiated between their respective families.⁸⁶

30. In the *AFRC case* at the SCSL Trial Chamber, Justices Sebutinde and Doherty distinguished arranged marriages from forced marriages.⁸⁷ Justice Sebutinde in differentiating between arranged marriages in peacetime and forced marriage opined that the former was at best a human rights violation, while the latter was criminal.⁸⁸ Justice Doherty on her part distinguished forced marriages from arranged marriage on three grounds: namely the lack of consent from the girl and/ or her parents; the fact that the families of both spouses were not involved in the process;

⁸³ Transcript of Trial Proceedings of 29 January 2015, Case File No. 002/19-09-2007-ECCC/TC, E1/254.1, p.16-34, 55-58, 60-67, 76-79; Transcript of Trial Proceedings of 2 February 2015, Case File No. 002/19-09-2007-ECCC/TC, E1/255.1, p. 6-9, 15-18; Trial Chamber, Civil Parties Closing Brief to *Case 002/01*, Case No. 002/19-09-2007-ECCC/TC, E295/6/2, paras.205-225.

⁸⁴ Closing Order, para. 1446.

⁸⁵ *[R (On the application of Quila and another) (FC)(Respondents) v Secretary of State for the Home Department (Appellant)]* (2011) UKSC 45.

⁸⁶ *Ibid.*, para. 9.

⁸⁷ The Appeal Chamber of the AFRC Case endorsed the distinction drawn by the two Judges of the Trial Chamber. See, AFRC Appeal Judgment, para. 194.

⁸⁸ AFRC Trial Judgment, Separate Concurring Opinion of Justice Sebutinde Appended to the Judgement Pursuant to Rule 88 (C), paras. 10 and 12.

and the absence of ceremonies.⁸⁹ Justice Doherty in the *AFRC case*, when drawing the distinction between arranged marriages and forced marriages, also noted that, the decision of the victims of forced marriages to remain in the union after the war in Sierra Leone did not negate the criminal nature of the act.⁹⁰ The Applicants submit that an analysis of forced marriages under oppressive regimes need not be predicated on a sharp or simplistic distinction from marriages arranged by families in times of relative peace.

31. In societies such as Cambodia with a history of arranged marriage, the distinction between forced marriage and arranged marriage can often be difficult to draw. The difficulty in drawing out the differences is evident in the jurisprudence of the SCSL where they sought to distinguish forced marriage from arranged marriage on the basis of either the absence of consent from the victims or parents. This line of distinction based on the presence or absence of consent, however, is often blurred in peace time and, we would argue, should be seen as along a spectrum.⁹¹ When the victims have not given consent or where such consent was given under duress, it is considered to be in breach of international law and has been addressed in a number of human rights instruments.⁹² In our interviews with 78 women who were survivors of wartime abduction during the Liberian conflict, many women distinguished between the “real wife” and the “war front wife”, noting in their responses that the former was a legitimate role and the latter was a sexual and wartime role. In the aftermath of the war, several of the women interviewed by our researcher stated that they faced a dilemma about living with “men who abducted them during the conflict and had children by them” because of extreme poverty which made it impossible for

⁸⁹ AFRC Trial Judgment, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), para. 36.

⁹⁰ AFRC Trial Judgment, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), para. 45.

⁹¹ See Sundari Anitha and Aisha K. Gill, ‘Reconceptualising consent and coercion within an intersectional understanding of forced marriage’ in Aisha K. Gill and Sundari Anitha (eds.) *Forced Marriage: Introducing a social justice and human rights perspective* (Zed Books, 2011) p.46-50; and Mariane C. Ferme, ‘Consent, Custom and Law in Debates Around Forced Marriage at the Special Court for Sierra Leone’ in A. Bunting, B. Lawrance and R. Roberts (Eds.) *Marriage by Force? Contestation over Consent and Coercion in Africa* (Ohio Univ. Press, 2016) 14.

⁹² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 16(1) - (2); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS, Vol. 993, Article 10(1); *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS, Vol. 999, Article 23(3); *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, UNTS, Vol. 1249, Article 16(1)(b); *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 10 December 1962, UNTS, Vol. 521, Article 1(1).

them to provide support for themselves and their children independent of their abductors. As a result, a number of the victims remained in the relationship after the war.⁹³

2.5. Consent, coercion and coercive circumstances

32. In conflict situations and under oppressive regimes, the distinction between forced marriage and arranged marriage is easier to draw and tease out because the absence of consent is implied in such situations. The jurisprudence of international criminal courts and tribunals, albeit largely in relation to sexual violence and related offences, is settled on the issue of lack of consent in situations of conflict or coercive or hostile circumstances. The examination of consent in the jurisprudence of international criminal courts and tribunals in cases of sexual violence and other gender based crimes are germane to the discussion undertaken here of forced marriage under international criminal law for two reasons. First, just like in forced marriage, the absence of consent on the part of the victim is at the core of sexual violence and other gender based crimes. Second, the distinct acts of sexual violence and other gender based crimes are often underlying components of the crime of forced marriage.

33. Integral to the examination of consent undertaken by international criminal courts and tribunals are the related concepts of coercion and hostile or coercive circumstances. The former denotes the absence of full and free consent and the latter refers to the prevailing environment or situation in which a victim is alleged to have given consent. The ICTR Trial Chamber expounded on the meaning of coercion in *Prosecutor v. Akayesu (Akayesu's case)* when defining rape and the elements of sexual violence. The Trial Chamber stated:

The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other form of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflicts or the military presence of Interahamwe among refugee women at the bureau communal.⁹⁴

34. The above inference drawn by the Trial Chamber in *Akayesu's case* of the likelihood of the presence of coercive circumstances in situations of armed conflict has been reaffirmed by both

⁹³ Liberia Country Report, Conjugal Slavery in War Partnership, on file with A. Bunting (2016).

⁹⁴ Akayesu Trial Judgment, para. 688.

the Trial⁹⁵ and Appeals Chamber⁹⁶ of the ICTY in several cases. The ICTY Appeals Chamber in relation to coercive circumstances has noted, in unequivocal terms, that the prevailing circumstances in most cases charged as war crimes or crimes against humanity will be almost universally coercive. And in the opinion of the ICTY, true consent is impossible in such situations.⁹⁷ Our research with more than 150 women in Sierra Leone, Uganda and Liberia found that women entered into complex negotiations with rebels or soldiers in order to stay alive, avoid severe violence, or save their children. Sometimes this meant not actively resisting demands from captors, consistent with the above analysis of coercive circumstances negating consent.⁹⁸

35. The issue of coercive circumstances has also been addressed by the SCSL within the framework of forced marriage and gender based crimes. The Trial Chamber in the *RUF case* expressed the view that a marked feature of hostile and coercive circumstances is the presumption of the absence of genuine consent to having sexual relations or contracting marriage.⁹⁹ In addition, the Appeals Chamber of the SCSL in *RUF case* has held further that where victims are enslaved and subjected to force and coercion, a court is not obliged to examine the issue of consent or specifically ascertain as to whether every victim did not consent.¹⁰⁰ Finally, both the ICTY and the SCSL have also stressed that “consent must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.”¹⁰¹

36. International criminal courts and tribunals have in a number of cases set out the factual circumstances which constitutes coercive environment where a victim is deemed incapable of giving consent. In the *RUF case*, the Trial Chamber opined that the rebels imposed a conjugal relationship on the victims “in an atmosphere of extreme violence and terror” (in which the

⁹⁵ *Prosecutor v. Zejnil Delalić & Ors* (Čelebići Trial Judgment) Case No. IT-96-21-T (16 November 1998), para. 495; In *Prosecutor v. Kvočka et al* Case No. IT-98-30/1-T (2 November 2001); *Prosecutor v. Furundžija* Case No. IT-95-17/1 (10 December 1998) para. 271 that any form of captivity vitiates consent; *Prosecutor v. Dragoljub Kunarac* Trial Judgment Case No. IT-96-23-T & IT-96-23/1-T (22 February 2001), para. 646 the ICTY Trial Chamber affirmed the position that a person in captivity could not have freely consented to sex.

⁹⁶ *Prosecutor v. Dragoljub Kunarac* Appeal Judgment Case No. IT-96-23-T & IT-96-23/1-A, para. 130, [Kunarac Appeal Judgment].

⁹⁷ *Ibid.*

⁹⁸ Conjugal Slavery in War Partnership, Interview transcripts 2013-2014, on file with A. Bunting. In Uganda, for example, some women tried to resist staying with these men but they had little option as they were often threatened with death or other severe forms of punishment, at times with a machete or a gun pointed to their head. Uganda country report, on file with A. Bunting (2016).

⁹⁹ *RUF Trial Judgment*, para. 1471.

¹⁰⁰ *Prosecutor v. Sesay, Kallon & Gbao* Case No. SCSL-04-15-A, Appeals Chamber Judgment (Oct. 26, 2009), para. 740 [*RUF Appeal Judgment*].

¹⁰¹ *Kunarac Appeal Judgment*, para. 127; *AFRC Trial Judgment*, para. 694.

perpetrators knew that the victims did not consent), abducted, deprived the victims of their liberty and prevented their escape through fear of death.¹⁰² In *Kunarac*, the ICTY Appeals Chamber restating the views of the ICTY Trial Chamber in the case stressed that “[f]orce or threat of force provides clear evidence of non-consent” in relation to rape.¹⁰³ The Appeals Chamber elaborating further noted that either physical weapons or the use of physical force are not necessary to indicate force against a victim. But threats to use force against the victim or another are sufficient indication of force as long as a reasonable inference can be drawn that the perpetrator will carry out the threat.¹⁰⁴ In *AFRC case*, the Trial Chamber noted that “[t]he consent or freewill of the victim is absent under conditions of enslavement.”¹⁰⁵ In *Sylvestre Gacumbitsi v. The Prosecutor*, the Appeals Chamber of the ICTR stated that “non-consent” may be inferred in circumstances of on-going genocidal campaigns or where a victim is detained.¹⁰⁶

37. The jurisprudence of international criminal law on consent and coercion in relation to sexual violence and gender based crimes is echoed in the ICC Elements of Crime. The definition of the term “forcibly” in footnote 12 the ICC Elements of Crime draws largely from the decision of the ICTR in *Akayesu’s case*.¹⁰⁷ The ICC Elements of Crime provides that “[t]he term forcibly is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”¹⁰⁸ The ICC Elements of Crime also extends this definition of the concept of force to the crimes against humanity of rape, enforced prostitution and sexual violence.¹⁰⁹

CONCLUSION

38. In conclusion, this Brief draws from the factual allegations contained in records before the ECCC, the literature and jurisprudence of international and domestic courts, and original comparative research to map out the evolution and development of forced marriage as a crime

¹⁰² RUF Trial Judgment, para. 1581.

¹⁰³ Kunarac Appeal Judgment, para. 129, citing Kunarac Trial Judgment, para. 458.

¹⁰⁴ Kunarac Appeal Judgment, para. 130, citing California Penal Code 1999, Title 9, Section 261(a)(6).

¹⁰⁵ AFRC Trial Judgment, para. 709.

¹⁰⁶ *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A (7 July 2006), para. 155.

¹⁰⁷ Akayesu Trial Judgment, para. 688.

¹⁰⁸ International Criminal Court, Elements of Crime, 2011, available at <https://www.icc-cpi.int/> accessed 26/05/2016.

¹⁰⁹ International Criminal Court, Elements of Crime, Articles 7(g) (1), 7(g)(3), 7(g)(6).

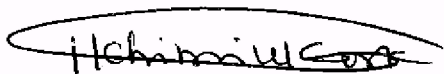
002/19-09-2007-ECCC/TC

crime against humanity of “other inhumane acts” and has addressed this legal characterisation of the regulation of marriage that occurred in Cambodia under the Khmer Rouge regime from 1975 until 1979 in *Case 002/02*. The Brief establishes that in the relevant period between 1975 and 1979, crimes against humanity of “other inhumane acts” was a recognised sub class of crimes under international criminal law recognised in treaties and customary international law. The Applicants submit that international criminal law has evolved to include the “other inhumane act” of forced marriage (along with other crimes) which captures the range and complexity of lived experiences of women and men in different oppressive or conflict situations.

All of which is respectfully submitted this **29 September 2016**,



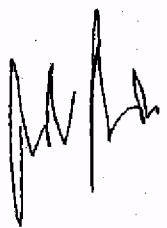
Dr. Annie Bunting



Dr. Izevbuwa Kehinde Ikhimikor



Dr Luke Moffett



Dr. Joel Quirk