

## FORCED MARRIAGE: TERMINOLOGICAL COHERENCE AND DISSONANCE IN INTERNATIONAL CRIMINAL LAW

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The Prosecutor of the International Criminal Court (ICC) has charged two accused, Dominic Ongwen and Al Hassan Ag Abdoul Aziz, with forced marriage as the crime against humanity of other inhumane acts.<sup>1</sup> Ongwen, a former senior leader and brigade commander in the Lord's Resistance Army<sup>2</sup> in northern Uganda, is charged with directly committing and having responsibility for a system of "forced exclusive conjugal partners" under which abducted girls and women were compelled to serve as "wives" within his brigade during the 2002–2005 time period.<sup>3</sup> Al Hassan, the former de facto chief of the Islamic police under armed groups Al-Qaeda in the Islamic Maghreb and Ansar Dine, is charged with participating in a policy of forced marriages which victimized the female inhabitants of Timbuktu, Mali, in 2012–2013, and led to repeated rapes and sexual enslavement of these women and girls.<sup>4</sup> These charges broke new ground for the ICC, which had never before laid charges explicitly focused on forced marriage.<sup>5</sup>

These charges build upon developments at two other international(ized) criminal tribunals: the Special Court for Sierra Leone (the "Special Court" or SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).<sup>6</sup> The Special Court

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<sup>1</sup> Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Decision on the Confirmation of Charges against Dominic Ongwen (Pre-Trial Chamber II Mar. 23, 2016) [hereinafter Ongwen Confirmation of Charges]; Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18, Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Pre-Trial Chamber I Mar. 27, 2018) [hereinafter Al Hassan Arrest Warrant].

<sup>2</sup> Ongwen Confirmation of Charges, *supra* note 1, ¶ 1.

<sup>3</sup> *Id.* ¶¶ 104–17, 136–38.

<sup>4</sup> Al Hassan Arrest Warrant, *supra* note 1, ¶¶ 5–7, 9, 12.

<sup>5</sup> The ICC had, however, considered evidence of forced marriage under the charge of sexual slavery. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 431 (Pre-Trial Chamber I Sept. 30, 2008).

<sup>6</sup> The Special Court for Sierra Leone is considered to be an "international" criminal tribunal. See Prosecutor v. Norman, Case No. SCSL-2004-14/15/16-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, ¶¶ 49–52 (Appeals Chamber Mar. 13, 2004) (explaining that the Special Court "is established *outside* the national court system" and "is not anchored in any existing system"); Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶¶ 37–42 (Appeals Chamber May 31, 2004) ("[T]he Special Court was established to fulfil an international mandate and is part of the machinery of international justice."). The Special Court was provided with international legal personality. See Agreement

was the first international court to enter convictions of forced marriage as a type of crime against humanity.<sup>7</sup> In its judgments, the Special Court concluded that, during the armed conflict in Sierra Leone in the 1990s, a large number of civilian women and girls were forced to serve as so-called “bush wives” to rebel forces within a widespread and organized system of slavery.<sup>8</sup> These girls and women were expected to submit to rape as demanded by their “husbands,” do domestic chores, porter their husband’s belongings, and bear and rear any children conceived from their rapes.<sup>9</sup> The Special Court convicted leaders of a rebel group for their participation in a joint criminal enterprise which supported this system of forced marriage.<sup>10</sup>

Following the example set by the Special Court for Sierra Leone, the ECCC also convicted individuals for their participation in a joint criminal enterprise which carried out a nationwide policy of forced marriage.<sup>11</sup> The ECCC found that, during the 1975–1979 reign of the Khmer Rouge in Cambodia, men and women—often strangers—were forced to marry as part of the ruling party’s attempts to implement the “great leap forward” in the regime’s socialist revolution.<sup>12</sup> The forcibly married individuals were pressured to have sex and produce children.<sup>13</sup>

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between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 11(d), Jan. 16, 2002, 2178 U.N.T.S. 138 (granting the Special Court the “judicial capacity necessary to” “[e]nter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court”) (entered into force Apr. 12, 2002). The ECCC refers to itself as an “internationalized” criminal tribunal because it is a “Cambodian court with international elements.” *Is the ECCC a Cambodian or an International Court?*, Extraordinary Chambers in the Court of Cambodia (July 20, 2017), <https://www.eccc.gov.kh/en/faq/eccc-cambodian-or-international-court> [<https://perma.cc/XM9M-H5NW>].

<sup>7</sup> Press Release, Special Court for Sierra Leone Office of the Prosecutor, *Special Court Prosecutor Hails RUF Convictions* (Feb. 25, 2009), <http://www.rscsl.org/Documents/Press/OTP/prosecutor-022509.pdf> [hereinafter RUF Trial Judgment Press Release]; Press Release, Special Court for Sierra Leone Office of the Prosecutor, *Prosecutor Welcomes Convictions in RUF Appeals Judgment* (Oct. 26, 2009), <http://www.rscsl.org/Documents/Press/OTP/prosecutor-102609.pdf> [hereinafter RUF Appeals Judgment Press Release].

<sup>8</sup> Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶ 1295 (Trial Chamber I Mar. 2, 2009) [hereinafter RUF Trial Judgment]. See also SUSAN MCKAY & DYAN MAZURANA, WHERE ARE THE GIRLS? GIRLS IN FIGHTING FORCES IN NORTHERN UGANDA, SIERRA LEONE AND MOZAMBIQUE: THEIR LIVES DURING AND AFTER WAR 92 (2004) (reporting that sixty percent of girl soldiers interviewed indicated that they had served as “wives” to the Revolutionary United Front combatants, or other fighting forces).

<sup>9</sup> RUF Trial Judgment, *supra* note 8, ¶¶ 460, 1154–55, 1211–13, 1293, 1295, 1413, 1472.

<sup>10</sup> *Id.* at 678, 682, 685.

<sup>11</sup> Prosecutor v. Nuon (Case 002/02), Case No. 002/19-09-2007/ECCC/TC, Summary of Judgment in Case 002/02, ¶¶ 39, 51, 60 (Trial Chamber Nov. 16, 2018) [hereinafter Summary of Judgment in Case 002/02].

<sup>12</sup> *Id.* ¶¶ 5–6, 39–40.

<sup>13</sup> *Id.* ¶¶ 39–40.

Interestingly, each tribunal has defined and understood forced marriage in a somewhat different manner.<sup>14</sup> Indeed, even within a tribunal, interpretations of forced marriage vary.<sup>15</sup> This Article examines the variances in perceptions of forced marriage as the crime against humanity of “other inhumane acts.” It begins by describing how the first international criminal tribunal to consider forced marriage—the Special Court for Sierra Leone—approached the violation.<sup>16</sup> It further analyzes the Special Court’s changing categorization of forced marriage.<sup>17</sup> The Article then explores how the ECCC followed the Special Court’s lead, but also incorporated more direct reference to international human rights law’s approach to forced marriage.<sup>18</sup> Finally, it recounts how the ICC has—to some extent—bridged the differences between the varying interpretations by bringing together the international criminal law definition of forced marriage set out by the Special Court’s Appeals Chamber with aspects of international human rights law’s understanding of rights related to marriage.<sup>19</sup>

This Article concludes, however, that the debate raised by these tribunals’ differing approaches to forced marriage is not settled. While there is momentum around one definition—of that proffered by the Special Court’s Appeals Chamber—it leaves the question raised by the Special Court’s *Taylor* Trial Chamber unanswered: should the international criminal law community abandon the forced marriage terminology in favor of another label?<sup>20</sup>

### I. FORCED MARRIAGE AND THE SPECIAL COURT FOR SIERRA LEONE

The Prosecutor of the Special Court for Sierra Leone brought charges for forced marriage as the crime against humanity of “other inhumane acts” in two cases:

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<sup>14</sup> See *Al Hassan Arrest Warrant*, *supra* note 1; RUF Trial Judgment Press Release, *supra* note 7; RUF Appeals Judgment Press Release, *supra* note 7.

<sup>15</sup> See, e.g., *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Decision on Defence Motion for Judgment of Acquittal Pursuant to Rule 98, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde, ¶ 14 (Trial Chamber Mar. 31, 2006) [hereinafter *AFRC Decision on Motion for Judgment of Acquittal Pursuant to Rule 98*] (stating that “the acts of ‘forced marriage’ that occurred within the context of the Sierra Leonean conflict, are in fact *a form of sexual violence* pursuant to Article 2.g. of the Statute and could equally qualify as a form of *sexual slavery* pursuant to Article 2.g. of the Statute,” but that she is “not persuaded that the acts of ‘forced marriage’ . . . can be properly charged under the general regime of ‘other inhumane acts’ pursuant to Article 2.i. of the Statute”).

<sup>16</sup> See *infra* Part I.

<sup>17</sup> See *infra* Part I. Compare *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Judgment, ¶ 713 (Trial Chamber II June 20, 2007) [hereinafter *AFRC Trial Judgment*], with *Prosecutor v. Brima*, Case No. SCSL-04-16-A, Judgment, ¶ 195 (Appeals Chamber Feb. 22, 2008) [hereinafter *AFRC Appeals Judgment*].

<sup>18</sup> See *infra* Part 2; see also, e.g., *Prosecutor v. Nuon*, Case No. 002/19-09-2007-ECCC-OClI, Closing Order, ¶¶ 1432, 1442–46 (Sept. 15, 2010) [hereinafter *ECCC Closing Order*].

<sup>19</sup> See *infra* Part III; see also, e.g., *Ongwen Confirmation of Charges*, *supra* note 1, ¶¶ 88–93.

<sup>20</sup> See *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgment, ¶¶ 424–27, 430 (Trial Chamber II May 18, 2012) [hereinafter *Taylor Trial Judgment*].

*Prosecutor v. Brima, Kamara and Kanu*<sup>21</sup> (referred to as the Armed Forces Revolutionary Council or AFRC case), and *Prosecutor v. Sesay, Kallon and Gbao*<sup>22</sup> (referred to as the Revolutionary United Front or RUF case).<sup>23</sup> The trial judges of the Special Court also considered evidence of forced marriage in the case of *Prosecutor v. Taylor* in support of charges of sexual slavery and other forms of enslavement.<sup>24</sup> The Special Court's Statute does not include a specifically enumerated violation called "forced marriage," which is why the charges were considered under the "other inhumane acts" category.<sup>25</sup>

The judges in the AFRC trial were the first to consider the violation of forced marriage, which had never before been litigated at an international criminal tribunal.<sup>26</sup> Given the lack of precedent, the judges had to identify the contours of the violation, which revealed their differing interpretations of the term as applied to the armed conflict in Sierra Leone.<sup>27</sup>

The violation of forced marriage was not present in the original AFRC indictment, but was added to the section titled "Sexual Violence" as a result of a later request by the Prosecutor.<sup>28</sup> In agreeing to the Prosecutor's request, the Trial Chamber concluded that forced marriage was a "kindred offence" to the already-charged offenses of rape and sexual slavery.<sup>29</sup> This was an early indication that at least some of the judges equated forced marriage with sexual offenses, rather than viewing forced marriage as a gendered offense containing both sexual and non-sexual elements (such as forced domestic labor and portering).<sup>30</sup> This focus on the sexual

<sup>21</sup> Case No. SCSL-2004-16-PT, Further Amended Consolidated Indictment, ¶¶ 51–57 (Feb. 18, 2005).

<sup>22</sup> Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment, ¶ 60 (Aug. 2, 2006).

<sup>23</sup> The Prosecutor requested the addition of forced marriage charges to a third case involving leaders of the Civil Defence Forces, but was denied. *See* *Prosecutor v. Norman*, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment (Trial Chamber May 20, 2004). For critiques of this decision and an explanation of the events that followed, see Michelle S. Kelsall & Shanee Stepakoff, *'When We Wanted to Talk About Rape': Silencing Sexual Violence at the Special Court for Sierra Leone*, 1 INT'L J. TRANSITIONAL JUST. 355 (2007); Valerie Oosterveld, *The Special Court for Sierra Leone, Child Soldiers, and Forced Marriage: Providing Clarity or Confusion?*, 45 CAN. Y.B. INT'L L. 131, 159–68 (2007).

<sup>24</sup> Taylor Trial Judgment, *supra* note 20, ¶¶ 422, 424–30, 1101, 1700.

<sup>25</sup> *See* AFRC Trial Judgment, *supra* note 17, ¶ 701 (summarizing the Prosecutor's explanation).

<sup>26</sup> *See id.*

<sup>27</sup> *Id.* ¶¶ 701, 713–14.

<sup>28</sup> *Prosecutor v. Brima*, Case No. SCSL-04-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶ 58 (Trial Chamber May 6, 2004) [hereinafter AFRC Motion to Amend Indictment].

<sup>29</sup> *Id.* ¶¶ 51–52.

<sup>30</sup> For more detail, see Valerie Oosterveld, *Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties*, 2 J. INT'L & HUMANITARIAN LEGAL STUD. 127, 131 (2011).

aspects was confirmed by one of the judges midway through the trial.<sup>31</sup> At that time, Justice Sebutinde indicated that “the sexual element inherent in these acts [of forced marriage] tends to dominate the other elements therein” and therefore, in her view, the forced marriage evidence was already covered by the sexual slavery charge.<sup>32</sup> The Prosecutor argued against this notion, distinguishing forced marriage from sexual slavery based on the status of “wife” conferred by the AFRC on its victims.<sup>33</sup> In the Prosecutor’s view, the victims of forced marriage suffered from harms that can be distinguished from those of sexual slavery: “first, the non-consensual conferral of the status of ‘marriage’ and the resulting long-lasting physical and psychological damage, as well as societal stigmatization, and, second, the harms caused by the consequent forced duties associated with being a ‘wife.’”<sup>34</sup> The Prosecutor seemed to have used the term “marriage” not in its strict legal sense as defined in international human rights law, but as a term meant to capture a corrupted version of pre-war peacetime marriages in Sierra Leone, in which women and girls were largely treated as subordinate to men.<sup>35</sup>

Justice Sebutinde revived her view in the final trial judgment, which was also adopted by a second judge.<sup>36</sup> As the majority, the judges dismissed the forced marriage charges on the grounds that they were redundant and “completely subsumed” by the sexual slavery charges.<sup>37</sup> The majority judges did not accept the Prosecutor’s conceptualization of harms, nor that there was any evidence of these harms:

Not one of the victims of sexual slavery gave evidence that the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental. Moreover, in the opinion of the Trial Chamber, had there been such evidence, it would not by itself have amounted to a crime against humanity, since it would not have been of similar gravity to the [other crimes against humanity listed in the Statute of the Special Court for Sierra Leone].<sup>38</sup>

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<sup>31</sup> See AFRC Decision on Motion for Judgment of Acquittal Pursuant to Rule 98, *supra* note 15.

<sup>32</sup> *Id.* ¶ 16.

<sup>33</sup> AFRC Trial Judgment, *supra* note 17, ¶ 701.

<sup>34</sup> Oosterveld, *supra* note 30, at 132.

<sup>35</sup> *Id.* at 133. See Karine Bélair, *Unearthing the Customary Law Foundations of “Forced Marriages” During Sierra Leone’s Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women’s Rights in Post-Conflict Sierra Leone*, 15 COLUM. J. GENDER & L. 551, 567–77 (2006). The Special Court’s Prosecutor referred to this as “forced conjugal association” and a “vener” of marriage on appeal. AFRC Appeals Judgment, *supra* note 17, ¶ 189.

<sup>36</sup> AFRC Trial Judgment, *supra* note 17, ¶¶ 2116, 2120, 2123.

<sup>37</sup> *Id.* ¶¶ 713–14.

<sup>38</sup> *Id.* ¶ 710. This assertion has been criticized. See, e.g., Neha Jain, *Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution*, 6 J. INT’L CRIM. JUST. 1013, 1018 (2008).

Ultimately, this assertion signals that the majority judges approached forced marriage in a very different manner than the Prosecutor. In particular, while the Prosecutor used the term “marriage” in a metaphorical sense to cover a scenario of sexual and domestic slavery, the majority judges used it in a literal sense, defining “marriage” as “establishing mutual obligations inherent in a husband[-]wife relationship.”<sup>39</sup> This view of marriage, which is reflective of that found in international human rights law,<sup>40</sup> was contrasted with the term “wife.” The majority judges concluded that the victims did not consider themselves to be married, but rather that the term “wife” was imposed on the victims as the rebels’ label for sexual slavery.<sup>41</sup>

The dissenting judge, Justice Doherty, did not support this majority view.<sup>42</sup> Taking a position similar to that of the Prosecutor, she categorized the “marriage” in Sierra Leonean-wartime-forced-marriage as something distinct within international criminal law.<sup>43</sup> She defined the violation as “the imposition, by threat or physical force arising from the perpetrator’s words or other conduct, of a forced conjugal association by the perpetrator over the victim.”<sup>44</sup> This “forced conjugal association” was not the same as marriage under international human rights law (or under traditional Sierra Leonean law); while it echoed international human rights law in focusing on non-consent, the “marriage” portion referred instead to a form of “ownership by a particular rebel.”<sup>45</sup> She pointed out that the line between this international criminal law version of wartime “wife” and peacetime understandings of “wife” in Sierra Leone become somewhat blurred when one considers the post-war context: some of the victims remained with their “husbands” after the war because they could not find an alternative to this situation, they accepted their lot in life, they were rejected by their families and communities, or they felt an obligation to rear the children born during the forced marriage.<sup>46</sup> However, she added that the decision to remain in the forced marriage does not negate the original criminality of the act.<sup>47</sup>

<sup>39</sup> AFRC Trial Judgment, *supra* note 17, ¶ 711.

<sup>40</sup> It is reflective of international human rights law in terms of implying freely given consent and obligations attached to that consent. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); 999 U.N.T.S. 171; 6 ILM 368 (1967) (entry into force Mar. 23, 1976), art. 23(3)–(4).

<sup>41</sup> AFRC Trial Judgment, *supra* note 17, ¶ 712.

<sup>42</sup> *Id.*; Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (‘Forced Marriages’), ¶¶ 14–15.

<sup>43</sup> *Id.* ¶¶ 53, 58–71.

<sup>44</sup> *Id.* ¶ 53.

<sup>45</sup> *Id.* ¶¶ 36, 46, 53, 63–65, 69, 71.

<sup>46</sup> *Id.* ¶ 45. This is consistent with other observations of the continuum of gender-based violence and discrimination before, during, and after war. *See, e.g.*, FIONNUALA N. AOLÁIN, DINA F. HAYNES & NAOMI CAHN, ON THE FRONTLINES: GENDER, WAR, AND THE POST-CONFLICT PROCESS 36–39 (2011).

<sup>47</sup> AFRC Trial Judgment, *supra* note 17, at Doherty Dissent, ¶ 45.

Justice Doherty also concluded that forced marriage was a type of violation with important aspects that differentiated it from sexual slavery, and thus forced marriage could not be entirely subsumed within the sexual slavery charges.<sup>48</sup> She found that forced marriage differs from sexual slavery because it “is concerned with the mental and physical trauma of being forced unwillingly into a marital arrangement, the stigma associated with being labeled a rebel ‘wife’ and the corresponding rejection by the community.”<sup>49</sup>

Justice Doherty additionally rejected the majority’s conclusion that there was no evidence that the status of “wife” caused trauma to 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.”<sup>50</sup> In particular, the victims’ mental trauma included being “forced to associate with and in some cases live together with men whom they may fear or despise.”<sup>51</sup>

On appeal, the Appeals Chamber rejected the majority judges’ view that forced marriage was the same as sexual slavery.<sup>52</sup> Using strong language, it stated: “the Appeals Chamber finds that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery.”<sup>53</sup> This is because forced marriage may be distinguished from sexual slavery in two ways:

First, forced marriage involves a perpetrator compelling a person by force or threat of force . . . into a conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife,” which could lead to disciplinary consequences for breach of this exclusive arrangement.<sup>54</sup>

The Appeals Chamber contrasted this with exercises of power attaching to the right of ownership required in sexual slavery.<sup>55</sup> The Appeals Chamber also identified a number of harms associated with forced marriage that may further differentiate it from sexual slavery, including injuries to victims from the imposition of the label “wife,” social ostracization, forced domestic labor such as cooking and cleaning, forced reproductive work such as forced pregnancy and forced child-rearing, forced sexual exclusivity, and serious punishment for failure to carry out these tasks.<sup>56</sup> It

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<sup>48</sup> *Id.* ¶ 14, 50.

<sup>49</sup> *Id.* ¶ 42.

<sup>50</sup> *Id.* ¶ 51.

<sup>51</sup> *Id.* ¶ 48.

<sup>52</sup> AFRC Appeals Judgment, *supra* note 17, ¶ 195.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *See id.* ¶ 190.

<sup>56</sup> *Id.* ¶¶ 190–93, 199–200.

pointed out that the “husbands” in the Sierra Leonean wartime forced marriages were expected to provide food, clothing, and protection to their “wives,” including protection from rape by other men, acts they would not necessarily perform for sexual slaves.<sup>57</sup>

Echoing Justice Doherty’s approach, the Appeals Chamber concluded that forced marriage can be defined as:

[A] situation in which the perpetrator[,] through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.<sup>58</sup>

In this definition, the Appeals Chamber appears to have accepted that the term “forced marriage” does not need to refer to legal marriage identified under international human rights law.<sup>59</sup> Instead, it assumes that a “marriage-like” scenario—albeit one with massive differences in power between the “wife” and the “husband”—taking place during an armed conflict suffices to satisfy the term.<sup>60</sup> Ultimately, the Appeals Chamber did not enter fresh convictions for forced marriage, relying instead on the expressive nature of its conclusion that forced marriage is criminal in nature.<sup>61</sup>

The consideration of forced marriage by the Trial and Appeals Chambers in the AFRC case set the stage for further consideration in *Prosecutor v. Sesay, Kallon and Gbao*.<sup>62</sup> In that case, the Trial Chamber avoided the debates that underlay the AFRC case over how “marriage” should be construed.<sup>63</sup> Rather, the RUF Trial Chamber focused on the question of whether the collection of acts termed “forced marriage” in the Sierra Leone context satisfied the elements of the crime against humanity of “other inhumane acts.”<sup>64</sup> It considered evidence of: the capture or abduction of girls and women by RUF forces; their subsequent assignment as “wives” of RUF fighters; their expected loyalty to their “husbands”; the expectation that these “wives” would submit to sex on demand from their “husbands” and maintain this exclusive sexual relationship; forced domestic labor and portering by the “wives”; forced childbearing and child-rearing;

<sup>57</sup> *Id.* ¶ 190.

<sup>58</sup> *Id.* ¶ 196.

<sup>59</sup> *See id.* ¶¶ 184–85, 194–95.

<sup>60</sup> The Appeals Chamber discusses the difference between traditional arranged marriages, marriage as set out in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and wartime forced marriage in Sierra Leone. *Id.* ¶ 194.

<sup>61</sup> *Id.* ¶ 202.

<sup>62</sup> *See* RUF Trial Judgment, *supra* note 8, ¶¶ 1178, 1211.

<sup>63</sup> *See id.* ¶¶ 165–67.

<sup>64</sup> *See id.* ¶ 168. This approach was affirmed on appeal (though the Appeals Chamber also reiterated its definition of forced marriage set out in the AFRC Appeals Judgment). *Prosecutor v. Sesay, Case No. SCSL-04-15-A, Judgment, ¶¶ 735–36* (Appeals Chamber Oct. 26, 2009) [hereinafter RUF Appeals Judgment].

fear by the “wives” of violent retribution for failing in any of the expected responsibilities; and long-lasting societal stigma for having been labeled an RUF “wife.”<sup>65</sup>

Instead of focusing on “marriage,” the Trial Chamber focused on the word “wife.” The Trial Chamber found that “the use of the term ‘wife’ by the rebels was deliberate and strategic, with the aim of enslaving and psychologically manipulating the women and with the purpose of treating them like possessions.”<sup>66</sup> The Trial Chamber concluded that forced marriage played an important role in effectively disempowering and instilling fear within the civilian population, isolating the victims and destroying family nuclei, and undermining Sierra Leonean society.<sup>67</sup> It convicted the accused, resulting in the first international criminal convictions for forced marriage in armed conflict.<sup>68</sup>

Ultimately, the Trial Chamber seems to have adopted an approach which is specific to international criminal law.<sup>69</sup> Under this approach, the international human rights law definition of consensual, legal marriage is not at issue. Rather, the focus is on the term “wife” and a collection of non-consensual harms termed “forced marriage” that qualify as the crime against humanity of “other inhumane acts.”

The Special Court for Sierra Leone considered forced marriage in a third and final case: that of the former President of Liberia, Charles Taylor.<sup>70</sup> While Taylor was not charged with forced marriage as the crime against humanity of “other inhumane acts,” evidence of forced marriage was used to support other charges, including those of sexual slavery.<sup>71</sup> The *Taylor* Trial Chamber—which contained the same judges as the AFRC Trial Chamber—used the opportunity to opine on the term “forced marriage.”<sup>72</sup> Recall that the majority judges in the AFRC Trial Chamber focused on the “marriage” aspect of the term, defining marriage in a manner reflective of international human rights law.<sup>73</sup>

In the *Taylor* judgment, the Trial Chamber returned to this theme, finding that the term “forced marriage” is a “misnomer” because there was “not marriage in the universally understood sense of a consensual and sacrosanct union.”<sup>74</sup> Thus, the Trial Chamber felt that it was “inappropriate to refer to the perpetrators as ‘husbands.’”<sup>75</sup>

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<sup>65</sup> RUF Trial Judgment, *supra* note 8, ¶¶ 1154–55, 1211–13, 1293, 1295–96, 1412–13, 1466–72.

<sup>66</sup> *Id.* ¶ 1466.

<sup>67</sup> *Id.* ¶¶ 1348–49.

<sup>68</sup> RUF Trial Judgment Press Release, *supra* note 7; RUF Appeals Judgment Press Release, *supra* note 7.

<sup>69</sup> See RUF Trial Judgment Press Release, *supra* note 7, ¶ 1466.

<sup>70</sup> See Taylor Trial Judgment, *supra* note 20, ¶ 8.

<sup>71</sup> *Id.* ¶¶ 422, 1101, 1700.

<sup>72</sup> *Id.* ¶¶ 424–26, 429.

<sup>73</sup> See AFRC Trial Judgment, *supra* note 17, ¶¶ 701, 703–05; *supra* notes 39–41 and accompanying text.

<sup>74</sup> Taylor Trial Judgment, *supra* note 20, ¶¶ 425, 427.

<sup>75</sup> *Id.* ¶ 426.

This view reflected the views of some commentators, who had expressed concerns that no actual marriage had occurred in the Sierra Leone scenario.<sup>76</sup> Rather, the Trial Chamber redefined the acts previously described as forced marriage by the Special Court as “conjugal slavery.”<sup>77</sup> Conjugal slavery, according to the *Taylor* trial judges, was simply the combination of sexual slavery and enslavement through forced domestic labor.<sup>78</sup> The Trial Chamber stressed that conjugal slavery is not a new crime, but is a term encompassing two forms of slavery.<sup>79</sup> In recharacterizing forced marriage as conjugal slavery, the Trial Chamber attempted to redirect the discussion away from whether or not legal or other forms of marriage are required for the violation.

Despite the lack of uniformity in the manner in which the AFRC, RUF, and *Taylor* judgments approached forced marriage, the Special Court’s jurisprudence has influenced discussions of forced marriage by the Extraordinary Chambers in the Court of Cambodia and the International Criminal Court. This Article therefore turns next to an examination of how the ECCC has interpreted forced marriage as a violation of international criminal law.

## II. THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA AND FORCED MARRIAGE

The Extraordinary Chambers in the Courts of Cambodia were created to prosecute genocide, crimes against humanity, and war crimes committed during the 1975–1979 Khmer Rouge regime.<sup>80</sup> Forced marriage was not initially investigated by the ECCC due to incorrect but widely held assumptions that the Khmer Rouge regime was largely devoid of sexual or gender-based violence, but later launched an investigation at the prompting of the civil parties.<sup>81</sup> Forced marriage was therefore

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<sup>76</sup> See Jennifer Gong-Gershowitz, *Forced Marriage: A “New” Crime Against Humanity?*, 8 NW. J. INT’L HUM. RTS. 53, 65–66 (2009); Patricia V. Sellers, *Wartime Female Slavery: Enslavement?*, 44 CORNELL INT’L L. J. 115, 130 n.97, 137, 142 (2011).

<sup>77</sup> *Taylor* Trial Judgment, *supra* note 20, ¶428. Note that the issue of conjugal slavery versus forced marriage was not addressed by the Appeals Chamber.

<sup>78</sup> *Id.* ¶ 430.

<sup>79</sup> *Id.* Note, however, some confusing language at ¶ 429: “[T]he Trial Chamber considers 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.” The actual practice of the Trial Chamber, however, was to consider the forced marriage evidence under both the sexual slavery and enslavement (forced labor) charges, as explained in ¶¶ 427–28, 430.

<sup>80</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) (Cambodia), as amended by NS/RKM/1004/006 (Oct. 27, 2004), [https://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf) [<https://perma.cc/KM6E-QYHS>] [hereinafter ECCC Governing Law].

<sup>81</sup> See Prosecutor v. Nuon, Case No. 002/19-09-2007-ECCC-OCIJ, Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations (Dec. 18, 2009) [hereinafter ECCC Investigative Order on Forced Marriage]; Prosecutor v. Nuon, Case No.

considered in the Closing Order for Case 002, as well as in the second judgment in that case.<sup>82</sup>

The Closing Order for Case 002, issued in September 2010, described how forced marriage was one of the five policies implemented by the Communist Party of Kampuchea to implement the “great leap forward” within Cambodia’s socialist revolution.<sup>83</sup> The Communist Party regulated marriage to control sexual interactions between men and women and simultaneously to reconstruct the meaning of marriage in the country.<sup>84</sup> The Communist Party organized mass weddings of men and women who were forcibly married to each other in public buildings or public places.<sup>85</sup> The men and women usually did not know each other prior to the weddings.<sup>86</sup> If they refused to marry, they could be executed.<sup>87</sup> The forcibly married couples were expected to rapidly consummate their marriages, and thus, were often under surveillance.<sup>88</sup> The goal of the forced marriages was to quickly increase the population of desirable citizens through births.<sup>89</sup> In other words, forced marriage was used to control sexual relations within the Cambodian population in order to socially engineer the future population through forced procreation.<sup>90</sup>

The Closing Order charged forced marriage under the crimes against humanity of rape and “other inhumane acts.”<sup>91</sup> The use of the “other inhumane acts” category was influenced by the Special Court for Sierra Leone.<sup>92</sup> The actus reus was defined as “victims endured serious physical or mental suffering or injury,” including sexual violence,

002/19-09-2007-ECCC-OCIJ, Supplementary Submission (Apr. 30, 2009); Silke Studzinsky, *Victims of Sexual and Gender-Based Crimes Before the Extraordinary Chambers in the Courts of Cambodia: Challenges of Rights to Participation and Protection*, in *SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES* 173, 179 (Anne-Marie de Brouwer et al. eds., 2013).

<sup>82</sup> ECCC Closing Order, *supra* note 18, ¶¶ 156–57.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* ¶¶ 216–17.

<sup>85</sup> *Id.* ¶¶ 220, 842, 844. These weddings ranged anywhere from two to over 100 couples. *Id.* ¶ 844.

<sup>86</sup> *Id.* ¶ 849.

<sup>87</sup> *Id.* ¶¶ 849–50.

<sup>88</sup> *Id.* ¶¶ 220, 314, 858, 1432.

<sup>89</sup> *See id.* ¶ 1447.

<sup>90</sup> *See* ROCHELLE BRAAF, *SEXUAL VIOLENCE AGAINST ETHNIC MINORITIES DURING THE KHMER ROUGE REGIME* 24–31 (2014) (for a victim-focused study on the state control inherent in these forced marriages).

<sup>91</sup> ECCC Closing Order, *supra* note 18, ¶¶ 1432, 1442–46. This Closing Order, in which forced marriage is discussed at length, was issued in 2010. This was prior to the Special Court’s 2012 trial judgment in *Taylor*, in which the Trial Chamber expressed the view that forced marriage was actually conjugal slavery consisting of forced labor plus sexual slavery. *See* Taylor Trial Judgment, *supra* note 20. Note also that the ECCC’s governing law does not list sexual slavery as a crime. *See* ECCC Governing Law, *supra* note 80.

<sup>92</sup> *See* ECCC Investigative Order on Forced Marriage, *supra* note 81, ¶ 11.

and “were forced to enter into conjugal relationships in coercive circumstances.”<sup>93</sup> The mens rea was that “the perpetrators knew of the factual circumstances that established the gravity of their acts.”<sup>94</sup>

The Co-Prosecutors’ Closing Brief, filed at the end of the second trial in Case 002, sets forth a more detailed understanding of forced marriage under the Khmer Rouge, bringing together both international criminal and human rights law.<sup>95</sup> The Closing Brief highlighted three main aspects of the centralized forced marriage policy of the Communist Party of Kampuchea.

First, it contrasted forced marriages under the Khmer Rouge regime with two types of “consent from the bride and groom” and their families—consent to spousal selection and consent to the marriage itself—that traditionally underpinned marriage in Cambodian society prior to the regime.<sup>96</sup> It did so while highlighting the “rich tradition” and “sacred rituals” that accompanied the decision by spouses and their families to get married in pre-Khmer Rouge Cambodia.<sup>97</sup> They also invoked the role of law and ceremony in these weddings.<sup>98</sup> In comparison, marriages under the Khmer Rouge “lacked consent from one or both spouses.”<sup>99</sup> The Communist Party of Kampuchea “removed the right of Cambodian people to marry freely to their partner of choice” and decided “*whether, when, and whom* couples would marry.”<sup>100</sup> In this manner, the Co-Prosecutors were alluding to international human rights law’s focus on freely given spousal consent and selection.<sup>101</sup>

Second, the Co-Prosecutors focused on the consequence of the forced marriage: forced consummation through rape.<sup>102</sup> The Communist Party of Kampuchea “felt entitled to take absolute control over ‘family building’ and sexual life,” which were expected to be sacrificed in order to build “revolutionary families” to serve the state ideology.<sup>103</sup> As a result, “[c]lose monitoring of the new couples [to ensure that they had sex] was, therefore, typically organised immediately after the weddings.”<sup>104</sup> The

<sup>93</sup> ECCC Closing Order, *supra* note 18, ¶ 1443.

<sup>94</sup> *Id.* ¶ 1444.

<sup>95</sup> Prosecutor v. Nuon, Case No. 002/19-09-2007-ECCC/TC, Co-Prosecutors’ Closing Brief, ¶¶ 585–86 (Trial Chamber May 2, 2017) [hereinafter ECCC Co-Prosecutors’ Closing Brief]. This Closing Brief discusses the central Communist Party of Kampuchea policy around pairings, organization and notification of marriages, and the monitoring of consummation, carried out in a similar, organized fashion.

<sup>96</sup> *Id.* ¶ 583.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* ¶ 611.

<sup>99</sup> *Id.* ¶ 585. *See also* ¶¶ 611–13.

<sup>100</sup> *Id.* ¶¶ 593, 599.

<sup>101</sup> *See id.* at 361 n.2401 (referring to a violation of Article 16 of the Universal Declaration of Human Rights on the right to marriage and family).

<sup>102</sup> *See id.* ¶¶ 585–86.

<sup>103</sup> *Id.* ¶¶ 587–88.

<sup>104</sup> *Id.* ¶ 598.

result was that “sexual intercourse took place without the consent of either one or both participants in the sexual act and constituted rape.”<sup>105</sup>

Third, the Co-Prosecutors highlighted the “clinical[] execut[ion]” of the Communist Party of Kampuchea’s forced marriage policy.<sup>106</sup> Every aspect of forced marriage under the Khmer Rouge was regulated.<sup>107</sup> Authorities were directed to create male-female couples based on “identical political class, ethnicity, and background.”<sup>108</sup> The marriages were tracked and reports were sent up the hierarchy to the Party Centre.<sup>109</sup> Tens of thousands of men and women were forced into marriage under the Khmer Rouge, mostly with little to no advance notice.<sup>110</sup> “Many had never met their spouse before the ceremony and some were unable to recognise him or her afterwards.”<sup>111</sup> The spouses were not permitted to object; the consequences could be severe.<sup>112</sup> The circumstances of the forced marriages left many of the victims deeply upset and suffering from physical and mental trauma.<sup>113</sup>

In setting out their view of the applicable law, the Co-Prosecutors referred both to international human rights law and international criminal law.<sup>114</sup> They begin by noting that “[t]he right to be free of a coerced marriage is so fundamental that it was recognised in the Universal Declaration of Human Rights” in 1948, and numerous subsequent international instruments.<sup>115</sup> They then proposed a definition of forced marriage based on the Special Court for Sierra Leone Appeals Chamber’s approach: “[F]orced marriage occurs when the perpetrator compels a person by force, threat of force, or coercion to serve as a conjugal partner.”<sup>116</sup> The Co-Prosecutors then focused on lack of consent as defined in international criminal law to argue that a coercive environment, such as that created by the Khmer Rouge, vitiates consent.<sup>117</sup> In other words, the Co-Prosecutors proposed that, while international human rights law informs the understanding of forced marriage as lacking consent, international criminal law explains the contexts in which lack of consent is inherent.<sup>118</sup>

<sup>105</sup> *Id.* ¶ 615.

<sup>106</sup> *See id.* ¶ 587.

<sup>107</sup> *See id.* ¶ 599.

<sup>108</sup> *Id.* ¶ 600.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* ¶ 601.

<sup>111</sup> *Id.*

<sup>112</sup> *See id.* ¶¶ 603–04.

<sup>113</sup> *Id.* ¶¶ 601, 620–27.

<sup>114</sup> *See id.* ¶¶ 119–20 (referring to statutes of various ad hoc international tribunals, including the ICTY, ICTR, and ECCC).

<sup>115</sup> *Id.* ¶ 188 (referring to the 1964 Convention on Consent to Marriage, Article 23(3) of the International Covenant on Civil and Political Rights, and Articles 8 and 12 of the European Convention on Human Rights).

<sup>116</sup> ECCC Co-Prosecutors’ Closing Brief, *supra* note 95, ¶ 189 (citing AFRC Appeals Judgment, *supra* note 17, ¶ 196 and RUF Appeals Judgment, *supra* note 64, ¶¶ 735–36).

<sup>117</sup> *See id.* ¶ 190.

<sup>118</sup> *See id.*

The ECCC's Trial Chamber issued its second judgment in Case 002 in November 2018.<sup>119</sup> The Trial Chamber found that, under the Khmer Rouge, "[i]ndividuals were married in a widespread climate of fear and the consent purportedly given either before or during wedding ceremonies did not amount in most cases to genuine consent."<sup>120</sup> Additionally, these marriages were followed by forced sexual intercourse between the new spouses.<sup>121</sup> The two accused were therefore convicted of the crime against humanity of "other inhumane acts" committed through forced marriage and rape in the context of forced marriage.<sup>122</sup> This judgement therefore became the first to address forced marriage outside of armed conflict as a violation of international criminal law.<sup>123</sup>

The Sierra Leone and Cambodian circumstances were similar in some ways, but also very different.<sup>124</sup> In both contexts, forced marriage was an important policy tool to achieve the goals of the controlling group.<sup>125</sup> As well, forced marriage was carried out through violence or threats of violence.<sup>126</sup> Additionally, in both countries, the joining of one person to another took place without traditional rituals or the customary presence of the bride and groom's parents or relatives.<sup>127</sup> On the other hand, in Sierra Leone the victims were all identified as female and were not married under Sierra Leonean law,<sup>128</sup> whereas in Cambodia, the victims were both male and female and were married under Khmer Rouge law.<sup>129</sup> In Sierra Leone, the forced marriages

<sup>119</sup> The ECCC's Trial Chamber has only issued a summary of the judgment. At the time of writing, the full judgment was not yet available. See Summary of Judgment in Case 002/02, *supra* note 11.

<sup>120</sup> *Id.* ¶ 40.

<sup>121</sup> *See id.*

<sup>122</sup> *Id.* ¶¶ 41, 51, 60.

<sup>123</sup> See ECCC Co-Prosecutors' Closing Brief, *supra* note 95, ¶ 190 (discussing forced marriage within the context of a coercive environment or climate of fear that can exist independently of armed conflict).

<sup>124</sup> See also Jain, *supra* note 38, at 1025–28; Bridgette A. Toy-Cronin, *What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime Against Humanity*, 19 COLUM. J. GENDER & L. 539, 544–56, 561, 587 (2010).

<sup>125</sup> RUF Trial Judgment, *supra* note 8, ¶¶ 1348–49; ECCC Closing Order, *supra* note 18, ¶¶ 216–17.

<sup>126</sup> See AFRC Appeals Judgment, *supra* note 17, ¶ 195 (providing the Special Court's definition of "forced marriage"); RUF Trial Judgment, *supra* note 8, ¶¶ 1467–68 (discussing threats and violence); ECCC Closing Order, *supra* note 18, ¶¶ 849–50 (discussing the potential of execution).

<sup>127</sup> AFRC Trial Judgment, *supra* note 17, ¶ 36 of Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 ("Forced Marriage"); ECCC Co-Prosecutors' Closing Brief, *supra* note 95, ¶¶ 583, 611.

<sup>128</sup> Jain, *supra* note 38, at 1026.

<sup>129</sup> See generally Omer Aijazi & Erin Baines, *Relationality, Culpability and Consent in Wartime: Men's Experiences of Forced Marriage*, 11 INT'L J. TRANSITIONAL JUST. 463 (2017) (discussing the issue of male experiences of forced marriage in war).

occurred during an armed conflict with non-state actors as the perpetrators,<sup>130</sup> while in Cambodia the state was the perpetrator.<sup>131</sup> In Sierra Leone, forced marriage included forced domestic labor,<sup>132</sup> but in Cambodia, forced labor was not an inherent part of the forced marriage experience—it was part of the overarching Khmer Rouge revolutionary program and forced on virtually all Cambodians.<sup>133</sup> This means that the Special Court’s *Taylor* Trial Chamber’s recharacterization of forced marriage as conjugal slavery would likely not apply to the Khmer Rouge situation.

The fact that one international criminal law label—forced marriage—can be applied to two diverse circumstances illustrates the flexibility of the term. However, this flexibility also indicates that the violation of forced marriage is undertheorized, given the significant difference between the Special Court’s reliance on forced conjugal (domestic and sexual) labor as an integral part of the definition and the ECCC’s different emphasis on lack of consent to marriage and rape after marriage.<sup>134</sup>

### III. THE INTERNATIONAL CRIMINAL COURT AND FORCED MARRIAGE

As with the 2002 Statute of the Special Court and the 2001 Statute of the ECCC, the 1998 Rome Statute of the International Criminal Court (ICC) does not list forced marriage as a crime against humanity (or any other type of crime).<sup>135</sup> Indeed, the decision to charge forced marriage under the crime against humanity of “other inhumane acts” at the Special Court for Sierra Leone occurred in 2004, after the adoption of these Statutes.<sup>136</sup>

While the Special Court had already established jurisprudence on forced marriage by the time the ICC began considering cases with similar fact scenarios, the ICC’s Prosecutor did not initially charge forced marriage; instead, in *Prosecutor v. Katanga*, the prosecution charged facts involving forced marriage as sexual slavery.<sup>137</sup> In that case, the Pre-Trial Chamber linked sexual slavery and forced marriage when observing

<sup>130</sup> The individuals prosecuted for forced marriage were from the Revolutionary United Front and Armed Forces Revolutionary Council rebel groups. *See supra* Part I.

<sup>131</sup> The ECCC Closing Order describes a state of international armed conflict between Cambodia and Vietnam during the relevant time period. ECCC Closing Order, *supra* note 18, ¶¶ 150–55. However, the imposition of forced marriages throughout the country as part of the socialist revolution was not directly related to that international armed conflict, as evidenced in the description of the forced marriage facts at ¶¶ 216–20, which were separate from the war-related facts at ¶¶ 150–55.

<sup>132</sup> *See, e.g.*, RUF Trial Judgment, *supra* note 8, ¶¶ 1154–55, 1211–12, 1293, 1413, 1472.

<sup>133</sup> ECCC Closing Order, *supra* note 18, ¶¶ 311, 334, 336–37, 358, 377, 390–91, 407, 1394.

<sup>134</sup> *See* AFRC Appeals Judgment, *supra* note 17, ¶¶ 190, 199; Summary of Judgment in Case 002/02, *supra* note 11, ¶ 40.

<sup>135</sup> *See generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 U.N. Doc. A/CONF. 183/9 (entered into force July 1, 2002).

<sup>136</sup> *See* AFRC Motion to Amend Indictment, *supra* note 28, ¶ 8.

<sup>137</sup> Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 431, 434–35 (Sept. 30, 2008).

that “sexual slavery also encompasses situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors.”<sup>138</sup> While the Pre-Trial Chamber was likely explaining why it was acceptable to consider evidence of forced marriage under the sexual slavery charge, this observation harkened back to the Special Court for Sierra Leone’s AFRC Trial Chamber’s view that sexual slavery “subsume[s]” forced marriage.<sup>139</sup> The ICC Office of the Prosecutor’s 2014 Policy Paper on Sexual and Gender-Based Crimes does not discuss forced marriage, presumably continuing to consider forced marriage as falling under sexual slavery at the time the document was released.<sup>140</sup>

However, beginning with the case of *Prosecutor v. Ongwen*, the Office of the Prosecutor changed direction and charged forced marriage under the same category of crimes against humanity—“other inhumane acts”—used in the Special Court for Sierra Leone and the ECCC.<sup>141</sup> Ongwen is a former senior leader and brigade commander of the Lord’s Resistance Army (LRA) in northern Uganda.<sup>142</sup> He is charged with responsibility for a number of gender-based crimes, including rape, sexual slavery, forced pregnancy and forced marriage—in fact, his case “currently has the highest number of counts of sexual and gender-based crimes charges before the ICC.”<sup>143</sup> These charges include direct responsibility for forcing girls and women to serve as his “wives” and therefore as sexual and domestic slaves.<sup>144</sup> He is also accused of indirect responsibility for forced marriage as part of a common plan “to abduct women and girls in order for them to serve as forced ‘wives’, domestic servants and sex slaves to male LRA fighters.”<sup>145</sup> These “wives” “lived under constant threat of death or severe physical punishment if they failed to respect the exclusivity of the so-called ‘marriage’ imposed upon them, if they did not submit to sexual intercourse, if they tried to escape, or if they failed to perform any other duty assigned to them.”<sup>146</sup>

At the Confirmation of Charges stage, the defense argued that the forced marriage charges are subsumed under the sexual slavery charges, as the conduct for one is the same as the conduct for the other.<sup>147</sup> Relying on the Special Court for Sierra Leone’s AFRC Appeals Chamber judgment and the ECCC’s Closing Order in Case 002, the

<sup>138</sup> *Id.* ¶ 431.

<sup>139</sup> *See* AFRC Trial Judgment, *supra* note 17, ¶¶ 713–14.

<sup>140</sup> *See* International Criminal Court, Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes ¶ 34 (2014) (having the opportunity to address forced marriage, but choosing not to address it).

<sup>141</sup> *See* Ongwen Confirmation of Charges, *supra* note 1.

<sup>142</sup> *See id.* ¶¶ 3, 54, 58.

<sup>143</sup> WOMEN’S INITIATIVES FOR GENDER JUSTICE, GENDER REPORT CARD ON THE INTERNATIONAL CRIMINAL COURT 2018, at 123 (2018). For a helpful summary chart of these charges, see *id.* at 124.

<sup>144</sup> *See* Ongwen Confirmation of Charges, *supra* note 1, ¶¶ 102–04.

<sup>145</sup> *Id.* ¶ 137.

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* ¶¶ 87–88.

*Ongwen* Pre-Trial Chamber concluded that forced marriage may be charged as an “other inhumane act.”<sup>148</sup> It held that forced marriage “differs from the other crimes with which Dominic Ongwen is charged, and notably from the crime of sexual slavery, in terms of conduct, ensuing harm, and protected interests.”<sup>149</sup> This difference is twofold. First, forced marriage involves a forced conjugal union which is required to be exclusive: this “element of exclusivity . . . is the characteristic aspect of forced marriage and is an element which is absent” from sexual slavery.<sup>150</sup> Second, forced marriage differs from sexual slavery because it involves the imposition of “marriage” on the victim, “i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage, as well as of a social status of the perpetrator’s ‘wife.’”<sup>151</sup> Importantly, the Pre-Trial Chamber addressed the issue of the term “marriage”—a term that caused difficulties in the Special Court for Sierra Leone’s jurisprudence—by stating that the “marriage” need not be legal.<sup>152</sup> It recognized international human rights law by concluding that forced marriage “violates the independently recognised basic right to consensually marry and establish a family. This basic right is indeed the value (distinct from e.g., physical or sexual integrity, or personal liberty) that demands protection . . . .”<sup>153</sup> In other words, rather than focusing on whether the “marriage” in “forced marriage” meets the requirements of marriage under international law, the Pre-Trial Chamber focused on what the “marriage” prevents: a consensual choice to marry another and a decision to establish a family through the consensual choice. This is an implicit rejoinder to the Special Court for Sierra Leone’s *Taylor* trial judgment, which deemed “forced marriage” to be a misnomer.<sup>154</sup> The ICC will likely further develop its consideration of forced marriage in the *Ongwen* trial judgment, expected in 2019 or 2020.<sup>155</sup>

Forced marriage has been explicitly charged a second time at the ICC in the case of *Prosecutor v. Al Hassan*.<sup>156</sup> In that case, Al Hassan is charged with events taking place in Timbuktu, Mali, in 2012–2013.<sup>157</sup> He is alleged to have served as the *de facto* chief of the Islamic police and involved in the work of the Islamic court under Al-Qaeda in the Islamic Maghreb (AQIM) and Ansar Dine, which had taken control of Timbuktu during this time period.<sup>158</sup> The Warrant of Arrest alleges that Al Hassan

<sup>148</sup> See *id.* ¶¶ 89–92.

<sup>149</sup> *Id.* ¶ 92.

<sup>150</sup> *Id.* ¶ 93.

<sup>151</sup> *Id.*

<sup>152</sup> See *id.* (“The fact that such ‘marriage’ is illegal and not recognised by, in this case, Uganda, is irrelevant.”). It appears that the intra-LRA understanding of whether there was a “marriage” is the crucial fact, as opposed to whether there was marriage under Ugandan law.

<sup>153</sup> *Id.* ¶ 94 (footnotes omitted).

<sup>154</sup> See *Taylor* Trial Judgment, *supra* note 20, ¶¶ 425, 427.

<sup>155</sup> See generally *Ongwen* Case, INT’L CRIM. CT., <https://www.icc-cpi.int/uganda/ongwen> [<https://perma.cc/PX2E-YQA2>].

<sup>156</sup> See *Al Hassan* Arrest Warrant, *supra* note 1, ¶ 9.

<sup>157</sup> See *id.* ¶ 3.

<sup>158</sup> See *id.* ¶¶ 5, 7, 8.

played a part in implementing the policy of forced marriages created by AQIM and Ansar Dine, “which victimized the female population of Timbuktu and gave rise to repeated rapes and the sexual enslavement of women and girls.”<sup>159</sup> Forced marriage has been charged as the crime against humanity of “other inhumane acts,” as was done for all other forced marriage charges in the Special Court for Sierra Leone and the ECCC.<sup>160</sup> Al Hassan is also charged with rape, sexual slavery and gender-based persecution.<sup>161</sup> As this case is still at an early stage, with the Confirmation of Charges hearing scheduled for May 2019, there is no specific jurisprudence yet indicating whether the *Al Hassan* Pre-Trial Chamber will follow the approach to forced marriage set out by the *Ongwen* Pre-Trial Chamber.<sup>162</sup> The facts in the Warrant of Arrest do not reveal if there is a forced domestic labor component to the forced marriages, or whether the ICC’s Pre-Trial Chamber will need to adopt an approach closer to that of the ECCC.<sup>163</sup>

CONCLUSION: DEFINITIONAL COHERENCE AND DISSONANCE  
REGARDING FORCED MARRIAGE

There is no single conceptualization of forced marriage under international criminal law. Even so, the sparse case law to date indicates that there is some momentum around the Special Court for Sierra Leone Appeals Chamber’s definition of forced marriage, under which:

[A]n accused, by force, threat of force, or coercion, or by taking advantage of coercive circumstances, causes one or more persons to serve as a conjugal partner, and the perpetrator’s acts are knowingly part of a widespread or systematic attack against a civilian population and amount to the infliction of great suffering, or serious injury to body or to mental or physical health.<sup>164</sup>

This definition was referenced by the ECCC and the ICC.<sup>165</sup> This growing—albeit nascent—coherence provides a basis on which international criminal law can continue to develop its understanding and theorization of forced marriage.

At the same time, the case law examined in this Article reveals some fluidity in the definition and content of the “forced marriage” label. This flexibility can be helpful, given the diverse and complex range of practices referred to as forced marriage

<sup>159</sup> *Id.* ¶ 9.

<sup>160</sup> *See id.* ¶ 12.

<sup>161</sup> *See id.*

<sup>162</sup> *See Al Hassan Case*, INT’L CRIM. CT., <https://www.icc-cpi.int/mali/al-hassan/Pages/default.aspx> [<https://perma.cc/57XZ-5ZPY>] (displaying the next session date as May 6, 2019).

<sup>163</sup> *See generally Al Hassan Arrest Warrant*, *supra* note 1.

<sup>164</sup> RUF Appeals Judgment, *supra* note 64, ¶ 736.

<sup>165</sup> *See ECCC Closing Order*, *supra* note 18, ¶ 1443; *Ongwen Confirmation of Charges*, *supra* note 1, ¶ 89.

around the world.<sup>166</sup> It may allow future prosecutors applying international criminal law to charge forced marriage as the crime against humanity of “other inhumane acts” in scenarios that are different from Sierra Leone, Cambodia and Uganda. It may also allow prosecutors to better reflect the views of the victims of forced marriage, depending on whether they better identify with another crime category, such as “sexual slavery” or “enslavement.”<sup>167</sup>

However, the fluidity also reveals that important questions have not yet been definitively answered. For example, the Special Court’s Appeals Chamber uses the term forced “conjugal partner”,<sup>168</sup> what does “conjugal” mean in this context? Is forced domestic labor (or other forms of enslavement) an integral part of “conjugal”? If so, then how can this be reconciled with the ECCC’s approach? If forced domestic labor is not integral, then why did the Special Court consider this type of labor in detail in the RUF case? Finally, what should be done with respect to the *Taylor* Trial Chamber’s admonition that forced marriage is a misnomer and should be replaced by “conjugal slavery”?

The tribunals’ definition of “conjugal” is unclear. The Special Court seems to include sexual intercourse, domestic labor, childcare and child rearing within conjugality.<sup>169</sup> However, this list does not work for the ECCC, which only examined forced consummation.<sup>170</sup> The ICC’s approach in *Ongwen* may provide an answer to the differences noted between the Special Court and the ECCC’s approaches to conjugal duties. In *Ongwen*, the Pre-Trial Chamber identified two central elements of forced marriage: the imposition of “marriage” and its associated duties on a victim, and the imposition of required sexual or other exclusivity.<sup>171</sup> The Chamber also set out a range of additional indicators of forced marriage, including “restrictions on the freedom of movement, repeated sexual abuse, forced pregnancy, [and/]or forced labour,” such as forced domestic duties.<sup>172</sup> This list of elements and indicators show that both the Special Court and the ECCC’s approaches can be reconciled.

Taking a cue from the *Taylor* Trial Chamber, some have argued that international criminal law should eliminate the use of forced marriage as a charging label.<sup>173</sup> While the *Taylor* Trial Chamber recommended switching to the use of “conjugal

<sup>166</sup> See MARRIAGE BY FORCE?: CONTESTATION OVER CONSENT AND COERCION IN AFRICA 2 (Annie Bunting, Benjamin N. Lawrance & Richard L. Robert eds., 2016).

<sup>167</sup> Andrea Raab & Siobhan Hobbs, *Forced Relationships: Prosecutorial Discretion as a Pathway to Survivor-Centric Justice*, OPINIO JURIS (Sept. 13, 2018), <http://opiniojuris.org/2018/09/13/forced-relationships-prosecutorial-discretion-as-a-pathway-to-survivor-centric-justice> [<https://perma.cc/R2WQ-H8RD>].

<sup>168</sup> See AFRC Appeals Judgment, *supra* note 17, ¶ 196.

<sup>169</sup> See *id.* ¶ 190; RUF Trial Judgment, *supra* note 8, ¶ 1293.

<sup>170</sup> See Summary of Judgment in Case 002/02, *supra* note 11, ¶ 40.

<sup>171</sup> See *Ongwen* Confirmation of Charges, *supra* note 1, ¶ 93.

<sup>172</sup> *Id.* ¶ 92. It is unclear whether the Al Hassan case will adopt similar indicators.

<sup>173</sup> For example, Zawati proposes “marital slavery” as an alternative label. See HILMI M. ZAWATI, FAIR LABELLING AND THE DILEMMA OF PROSECUTING GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL TRIBUNALS 129 (2014).

slavery” as reflecting a combination of sexual and domestic slavery, some are concerned that the reference to “conjugal” will simply add to the confusion or will compound “patriarchal societal norms and a conservative construction of a woman’s roles [sic] in society and the home.”<sup>174</sup> Others recommend simply defining forced marriage acts as enslavement, or propose an understanding of forced marriage within the wider category of forced relationships, accompanied by prosecutorial discretion as to how to charge the forced relationships (e.g., as sexual slavery, enslavement, forced marriage, or something else).<sup>175</sup>

Given that the term continues to be used within international criminal law, forced marriage as a label seems to have some legal and factual resonance for prosecutors and some victims.<sup>176</sup> Charging of the same term under the same crime against humanity heading has created some nominal coherence in the definition. The ICC has taken steps to answer key questions, such as the meaning of “marriage” in the term “forced marriage.” It has also set out central elements of forced marriage and key indicators that create room for other scenarios in other countries to fit within the label. This all represents growth in understanding within international criminal law. However, given the questions raised by the *Taylor* Trial Chamber and commentators regarding the interlinkages and overlaps between forced marriage and different types of enslavement, it cannot yet be said that forced marriage is a settled concept in international criminal law.

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<sup>174</sup> Raab & Hobbs, *supra* note 167.

<sup>175</sup> See Annie Bunting, ‘Forced Marriage’ in *Conflict Situations: Researching and Prosecuting Old Harms and New Crimes*, 1 CAN. J. HUM. RTS. 165 (2012); Raab & Hobbs, *supra* note 167; Sellers, *supra* note 76, at 142.

<sup>176</sup> Raab & Hobbs, *supra* note 167 (noting that some victims prefer the label of “enslavement” to socially and legally signal their lack of consent).