

**Cour  
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**International  
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Date: 22 December 2021

**THE APPEALS CHAMBER**

**Before:** Judge Luz del Carmen Ibáñez Carranza, Presiding  
Judge Piotr Hofmański  
Judge Solomy Balungi Bossa  
Judge Reine Alapini-Gansou  
Judge Gocha Lordkipanidze

**SITUATION IN UGANDA**

**IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN***

**Public**

***Amici Curiae* Brief on Forced Marriage**

**Source:** Erin Baines  
Anne-Marie de Brouwer  
Annie Bunting  
Eefje de Volder  
Kathleen M. Maloney  
Melanie O'Brien  
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All *amici curiae*

**REGISTRY**

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## I. INTRODUCTION

1. On 24 November 2021, the Appeals Chamber granted leave to Erin Baines, Anne-Marie de Brouwer, Annie Bunting, Eefje de Volder, Kathleen M. Maloney, Melanie O'Brien, Osai Ojigho, Valerie Oosterveld, and Indira Rosenthal ("*amici*") to submit observations on the issue of forced marriage<sup>1</sup> stemming from the Appeals Chamber's order of 25 October 2021<sup>2</sup> and pursuant to Rule 103 of the Rules of Procedure and Evidence ("*Rules*"). The *amici* therefore submit the following observations.

## II. HISTORY OF RECOGNITION OF FORCED MARRIAGE UNDER THE CRIME AGAINST HUMANITY OF 'OTHER INHUMANE ACTS'

2. Forced marriage is not a "new" crime, contrary to the Defence assertion on appeal.<sup>3</sup> As this section will illustrate, forced marriage has been recognized as the crime against humanity of 'other inhumane acts' by the Special Court for Sierra Leone ("*SCSL*"), the Extraordinary Chambers in the Courts of Cambodia ("*ECCC*"), and the International Criminal Court ("*ICC*"), convicting multiple defendants relating to factual circumstances dating back more than four decades. Moreover, this jurisprudence comports with statutory and customary international criminal law expressly prohibiting 'other inhumane acts' for more than 75 years.
3. 'Other inhumane acts' were recognized as a crime against humanity in international legal instruments governing the Nuremberg<sup>4</sup> and Tokyo<sup>5</sup> trials and in Control Council Law No. 10 governing prosecutions of Axis perpetrators.<sup>6</sup> In 1950, the UN International Law Commission adopted the Nuremberg Principles, further codifying the crime against humanity of "other inhuman acts done against any

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<sup>1</sup> [Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence](#), 24 November 2021, para. 18.

<sup>2</sup> [Order inviting expressions of interest as amici curiae in judicial proceedings \(pursuant to rule 103 of the Rules of Procedure and Evidence\)](#), 25 October 2021.

<sup>3</sup> [Defence Appeal Brief](#), paras. 147-148.

<sup>4</sup> [Charter of the International Military Tribunal \(IMT\)](#), Article 6(c).

<sup>5</sup> [IMTFE Charter](#), Article 5.c.

<sup>6</sup> [Control Council Law No. 10](#), Article II.1(c).

civilian population.”<sup>7</sup> In the early 1990s, the UN Security Council established international *ad hoc* criminal tribunals through resolutions classifying ‘other inhumane acts’ as a crime against humanity in the statutes of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”).<sup>8</sup> In 1996, the International Law Commission (“ILC”) adopted the Draft Code of Crimes Against the Peace and Security of Mankind prohibiting “[o]ther inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm”, and recognized the impossibility of establishing “an exhaustive list of the inhumane acts which might constitute crimes against humanity.”<sup>9</sup> Two years later, the Rome Statute of the ICC (“Statute”) enshrined ‘other inhumane acts’ as a distinct crime against humanity,<sup>10</sup> as did the subsequent SCSL and ECCC statutes.<sup>11</sup> The ILC’s Draft articles on Prevention and Punishment of Crimes Against Humanity similarly recognize ‘other inhumane acts’ as a crime against humanity.<sup>12</sup>

4. ‘Other inhumane acts’ have also formed the basis for convictions by international and national tribunals for myriad sexual, non-sexual, and gender-based offenses. These include, *inter alia*, forced sterilization or experimentation with reproductive functioning,<sup>13</sup> forced public nudity,<sup>14</sup> sexual and physical mutilation of corpses,<sup>15</sup> serious physical and mental injuries,<sup>16</sup> beatings and inhumane treatment,<sup>17</sup> forcible

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<sup>7</sup> [Nuremberg Principles](#), Principle VI.c.

<sup>8</sup> [ICTY Statute](#), Article 5(i); [ICTR Statute](#), Article 3(i).

<sup>9</sup> [ILC Draft Code 1996](#), Commentary (17) on Article 18(k), at 50.

<sup>10</sup> [Statute](#), Article 7(1)(k).

<sup>11</sup> [Law on the Establishment of ECCC](#), Article 5; [SCSL Statute](#), Article 2(i).

<sup>12</sup> [Draft articles on Prevention and Punishment of Crimes Against Humanity](#), Article 2(1)(k).

<sup>13</sup> *U.S. v. Brandt et al.* (“Medical Case”), Judgment, 19 August 1946, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, [Vol. I](#), p. 13, [Vol. II](#), pp. 227, 279-280.

<sup>14</sup> [Akayesu Trial Judgment](#), para. 697.

<sup>15</sup> [Niyitegeka Trial Judgment](#), paras. 313, 465-467; [Kajelijeli Trial Judgment](#), para. 936.

<sup>16</sup> [Vasiljević Trial Judgment](#), para. 239; [Blaškić Trial Judgment](#), para. 239.

<sup>17</sup> [AFRC Brima et al. Appeal Judgment](#), paras. 184–185; [Tadić Trial Judgment](#), paras. 730, 737, 744.

transfer,<sup>18</sup> “forced disappearance, beatings, torture, sexual violence, humiliation, harassment, psychological abuse, and confinement in inhumane conditions,” and “mutilation and other types of severe bodily harm, beatings and other acts of violence.”<sup>19</sup> Such jurisprudence substantiates that ‘other inhumane acts’ was deliberately designed to be a residual and non-exhaustive category, like the open-ended war crime classification of ‘outrages upon personal dignity’, because “[a]n exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.”<sup>20</sup>

5. International criminal case law has reinforced the statutory basis for ‘other inhumane acts’ as a well-settled crime against humanity category and revealed its customary international law status.<sup>21</sup> The Defence raises a legality argument regarding forced marriage,<sup>22</sup> but the customary international law status of ‘other inhumane acts’ abrogates that argument.
6. The crimes against humanity category of ‘other inhumane acts’ has been interpreted for the last 14 years by international criminal courts (addressing a factual time span of more than 40 years) to include forced marriage. In 2008, in *Prosecutor v. Brima et al.*, known as the Armed Forces Revolutionary Council (“AFRC”) case, the SCSL Appeals Chamber found that ‘other inhumane acts’ formed part of customary international law.<sup>23</sup> The SCSL Appeals Chamber determined that forced marriage met the ‘other inhumane acts’ requirements<sup>24</sup> and was “firmly of the view that acts of forced marriage were of similar gravity to

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<sup>18</sup> [Stakić Appeal Judgment](#), para. 317; [Blagojević and Jokić Trial Judgment](#), para. 629; [Krstić Trial Judgment](#), para. 523.

<sup>19</sup> [Kvočka et al. Appeal Judgment](#), para. 435.

<sup>20</sup> [Kupreškić et al. Trial Judgment](#), para. 563, also citing [ICRC Commentary on IVth Geneva Convention](#), p. 39: “However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts: and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording is flexible, and, at the same time, precise.”

<sup>21</sup> [AFRC Brima et al. Appeal Judgment](#), para. 198.

<sup>22</sup> [Defence Appeal Brief](#), para. 978.

<sup>23</sup> [AFRC Brima et al. Appeal Judgment](#), paras. 198, 200.

<sup>24</sup> [AFRC Brima et al. Appeal Judgment](#), para. 198.

several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence.”<sup>25</sup> It also concluded that forced marriage was not subsumed by the crime against humanity of sexual slavery, and that the “abduction and use of women and girls as forced conjugal partners” was inhumane.<sup>26</sup> In assessing the gravity of forced marriage, the SCSL Appeals Chamber emphasized the long-lasting and stigmatizing harms to victims, especially given their ages, stating many “were children themselves”.<sup>27</sup> The SCSL Appeals Chamber held that SCSL Trial Chamber II erred in dismissing forced marriage as an ‘other inhumane act’.<sup>28</sup>

7. In 2009, in *Prosecutor v. Sesay et al.*, known as the Revolutionary United Front (“RUF”) case, the SCSL Appeals Chamber upheld the first-ever conviction for forced marriage as an ‘other inhumane act’ crime against humanity.<sup>29</sup> The SCSL Appeals Chamber endorsed its earlier legal characterization of forced marriage, confirming that the constituent acts of forced marriage met the requisite criteria for ‘other inhumane acts’.<sup>30</sup>
8. In 2018, the ECCC Trial Chamber convicted defendants for forced marriage as the crime against humanity of ‘other inhumane acts’ and the crime against humanity of rape within the forced marriage context.<sup>31</sup> The ECCC dismissed the Defence’s *nullum crimen sine lege* arguments, concluding that: (1) the forced marriage was correctly charged as ‘other inhumane acts’, which was prohibited under customary international law at the relevant time; and (2) ‘other inhumane acts’ is not restricted to a specifically-elaborated list of conduct.<sup>32</sup> Additionally, the ECCC held that the term ‘forced marriage’ did not need to have been recognized as an ‘other inhumane

<sup>25</sup> [AFRC Brima et al. Appeal Judgment](#), para. 200.

<sup>26</sup> [AFRC Brima et al. Appeal Judgment](#), paras. 190, 195, 202.

<sup>27</sup> [AFRC Brima et al. Appeal Judgment](#), paras. 199-200.

<sup>28</sup> [AFRC Brima et al. Appeal Judgment](#), paras. 202-203.

<sup>29</sup> [RUF Sesay et al. Appeal Judgment](#), paras. 726, 849, 861-862; [RUF Sesay et al. Trial Judgment](#), paras. 1464, 1473.

<sup>30</sup> [RUF Sesay et al. Appeal Judgment](#), para. 740.

<sup>31</sup> [Nuon Chea and Khieu Samphan Trial Judgment Case 002/02](#), paras. 4172, 4198, 4303-4305.

<sup>32</sup> [Nuon Chea and Khieu Samphan Trial Judgment Case 002/02](#), para. 741.

act’ by 1975; rather, what is important is that the category of ‘other inhumane acts’ was recognized as a crime against humanity at that time.<sup>33</sup> The ECCC Trial Chamber clarified that since ‘other inhumane acts’ is itself a distinct crime against humanity, *nullum crimen sin lege* requirements attach only to the category of ‘other inhumane acts’, not to the different sub-categories thereof, like forced marriage.<sup>34</sup>

9. In February 2021, in the case at hand, Trial Chamber IX (“Trial Chamber”) rendered the ICC’s first conviction for forced marriage in finding that the accused committed “the crime of forced marriage as other inhumane acts pursuant to article 7(1)(k)” of the Statute.<sup>35</sup> The Trial Chamber confirmed the elements of crime for ‘other inhumane acts’: (1) the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; and (2) such act was of a character similar to any other crime referred to in Article 7(1) of the Statute.<sup>36</sup> In the view of the *amici*, this is a correct characterization of the elements for ‘other inhumane acts’, and the correct understanding of forced marriage as an ‘other inhumane act’, thus satisfying *nullum crimen sine lege* requirements.<sup>37</sup>

### III. FORCED MARRIAGE AS AN ‘OTHER INHUMANE ACT’ IS DISTINCT FROM OTHER ACTS ENUMERATED IN ARTICLE 7(1) OF THE STATUTE

10. Forced marriage is a particular type of ‘other inhumane act’ that can be distinguished from the enumerated acts recognized in Article 7(1) of the Statute.
11. In the *Ongwen* Trial Judgment, the Trial Chamber noted – correctly, in the view of the *amici* – that forced marriage is similar in nature and gravity to the enumerated acts listed in Article 7(1) of the Statute, but also reflects a course of conduct which differs from those acts.<sup>38</sup>

<sup>33</sup> [Nuon Chea and Khieu Samphan Trial Judgment Case 002/02](#), para. 741.

<sup>34</sup> [Decision on Ieng Sary’s Appeal Against the Closing Order](#), para. 378.

<sup>35</sup> [Ongwen Trial Judgment](#), paras. 3026, 3069, 3116.

<sup>36</sup> [Ongwen Trial Judgment](#), para. 2743.

<sup>37</sup> [Prosecution Response to Defence Appeal Brief](#), paras. 563-564.

<sup>38</sup> [Ongwen Trial Judgment](#), paras. 2747-2748.

12. As recognized by the SCSL Appeals Chamber, that distinct course of conduct is composed of two types of harm: (1) the violation by the accused of the victim's relational autonomy (including resulting social ostracization); and (2) a constellation of rights violations.<sup>39</sup>
13. The first type of harm caused by forced marriage, the violation of relational autonomy, has been described in various ways under international law. Under international human rights law, the crux of forced marriage is the denial of the right to freely and consensually enter into marriage. In other words, the focus is on consent to marriage.<sup>40</sup> For example, the International Covenant on Civil and Political Rights ("ICCPR") states that "[n]o marriage shall be entered into without the free and full consent of the intending spouses".<sup>41</sup> Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") requires States Parties to ensure, "on a basis of equality of men and women: [...] (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent".<sup>42</sup> International human rights law bodies have recognized that forced marriage, as defined under international human rights law, can take place both in peacetime and in armed conflict.<sup>43</sup>
14. International criminal law similarly recognizes the deprivation of relational autonomy through the imposition of a "conjugal union" on a victim.<sup>44</sup> This union need not be marriage as recognized under domestic law, as it also includes relationships in which the victim is forcibly attached to a particular person outside

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<sup>39</sup> [AFRC \*Brima et al. Appeal Judgment\*](#), paras. 190-193, 199-200.

<sup>40</sup> [Human Rights Committee, General Comment 28](#), paras. 23-24; [Association pour le Progrès et la Défense des Droits des Femmes Maliennes \(APDF\) and the Institute for Human Rights and Development in Africa v Mali](#) (Merits) (2018) 2 African Court Law Report 380-401 at 394-395, paras. 91-94.

<sup>41</sup> [ICCPR](#), Article 23(3). See also [ICESCR](#), Article 10(1); [Convention on Consent to Marriage](#), Article 1(1). Apart from treaty law, see also the [Universal Declaration of Human Rights](#), Article 16(2).

<sup>42</sup> [CEDAW](#), Article 16(1)(b).

<sup>43</sup> [CEDAW Committee, General Recommendation 30](#), paras. 34, 62.

<sup>44</sup> [Ongwen Trial Judgment](#), para. 2748; [Ongwen Decision on the Confirmation of Charges](#), para. 93, [Al Hassan Decision on the Confirmation of Charges](#), para. 555; [AFRC \*Brima et al. Appeal Judgment\*](#), para. 195.



of the context of domestic marriage law.<sup>45</sup> These forced conjugal unions can take place during armed conflict or ‘peacetime’ mass atrocity, and under oppressive regimes, and can occur regardless of the victim’s existing marriage status.<sup>46</sup>

15. In the *Ongwen* Trial Judgment, the Trial Chamber correctly described this deprivation of relational autonomy as “the imposition, regardless of the will of the victim” of a forced conjugal union in which the victim is exclusively attached to the other member of the union, resulting in “consequent social stigma”.<sup>47</sup> The SCSL Appeals Chamber similarly described the deprivation of relational autonomy.<sup>48</sup>
16. The particular and enduring harms that stem from this aspect of forced marriage are numerous. As acknowledged by the SCSL and the Trial Chamber, these include stigmatization, social and cultural ostracism, mental trauma, a serious attack on the victim’s dignity, and the deprivation of the victim’s fundamental rights to choose a spouse and/or a conjugal relationship, all in a context of extreme coercion.<sup>49</sup>
17. The second type of harm caused by forced marriage stems from a constellation of rights violations, in addition to deprivation of relational autonomy. These rights violations may differ from situation to situation. For example, the SCSL identified numerous acts perpetrated against forced marriage victims: abduction, rape, sexual slavery, enforced exclusivity in the sexual relationship, inability to leave the conjugal union for fear of violent retribution, non-consent to being coerced into a polygamous conjugal situation, forced pregnancy, forced childbearing and childrearing, physical violence, forced domestic labour such as cooking and cleaning, and forced portering.<sup>50</sup> Further, the *Ongwen* Decision on the Confirmation

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<sup>45</sup> [Ongwen Decision on the Confirmation of Charges](#), para. 93: “The fact that such ‘marriage’ is illegal and not recognised by, in this case, Uganda, is irrelevant.” See also [Al-Hassan Decision on the Confirmation of Charges](#), para. 556.

<sup>46</sup> [CEDAW Committee, General Recommendation 30](#), paras. 34, 62; [RUF Sesay et al. Trial Judgment](#), para. 1412: the rebels did not care whether the forced ‘wives’ already had legitimate husbands.

<sup>47</sup> [Ongwen Trial Judgment](#), para. 2748.

<sup>48</sup> [AFRC Brima et al. Appeal Judgment](#), para. 195.

<sup>49</sup> [Ongwen Trial Judgment](#), para. 2749. See also [AFRC Brima et al. Appeal Judgment](#), para. 199.

<sup>50</sup> [AFRC Brima et al. Appeal Judgment](#), para. 190. See also [RUF Sesay et al. Trial Judgment](#), paras. 1154-1155, 1211-1213, 1293, 1295, 1408-1413, 1460, 1468, 1472. These were forced heterosexual conjugal unions.

of Charges and the *Ongwen* Trial Judgment also identified restrictions on the freedom of movement, psychological violence, psychological and physical effects on children born of forced marriage, and constant threat of death.<sup>51</sup>

18. As an ‘other inhumane act’, forced marriage differs from the other enumerated acts in Article 7(1) of the Statute in two ways. First, the forced ascription of the status of ‘spouse’ is not reflected in the other enumerated acts, and, second, while certain of the constellation of rights violations may overlap with the enumerated acts (such as rape, sexual slavery, and enslavement), some may not.<sup>52</sup>
19. International tribunals have identified specific distinctions between forced marriage and the enumerated crimes against humanity. For example, sexual slavery addresses “the perpetrator’s restriction or control of the victim’s sexual autonomy while held in a state of enslavement”, including “the exercise of ownership over a person”.<sup>53</sup> In contrast, “the other inhumane act of forced marriage penalizes the perpetrator’s imposition of ‘conjugal association’ with the victim”,<sup>54</sup> the associated forced “relationship of exclusivity”, and “disciplinary consequences for breach of this exclusive relationship.”<sup>55</sup> As well, “[t]he offence of rape requires sexual penetration, whereas ‘forced marriage’ requires a forced conjugal association based on exclusivity between the perpetrator and victim.”<sup>56</sup> Additionally, some forms of trauma and stigma suffered by forced marriage victims differ from those suffered by victims of sexual slavery and rape.<sup>57</sup>

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<sup>51</sup> [Ongwen Decision on the Confirmation of Charges](#), paras. 92, 137; [Ongwen Trial Judgment](#), para. 2748.

<sup>52</sup> This is particularly so with human rights violations such as the inability to leave the conjugal union for fear of violent retribution.

<sup>53</sup> [Ongwen Trial Judgment](#), para. 2750. See also [AFRC Brima et al. Appeal Judgment](#), para. 195; [RUF Sesay et al. Trial Judgment](#), para. 2307.

<sup>54</sup> [Ongwen Trial Judgment](#), para. 2750. See also [AFRC Brima et al. Appeal Judgment](#), para. 195; [RUF Sesay et al. Trial Judgment](#), para. 2307.

<sup>55</sup> [AFRC Brima et al. Appeal Judgment](#), para. 195; [RUF Sesay et al. Trial Judgment](#), para. 2307.

<sup>56</sup> [RUF Sesay et al. Trial Judgment](#), para. 2306.

<sup>57</sup> [Ongwen Trial Judgment](#), para. 2750. See also [AFRC Brima et al. Appeal Judgment](#), para. 199. The SCSL Trial Chamber noted the “lasting social stigma” attached to the ‘bush wives’, “which hampers their recovery and reintegration into society”. See [RUF Sesay et al. Trial Judgment](#), para. 1296.

20. Therefore, the Trial Chamber correctly concluded that forced marriage is distinct from, and not subsumed by, the enumerated acts in Article 7(1) of the Statute.<sup>58</sup>

#### IV. FORCED MARRIAGE AND ELEMENTS OF ‘OTHER INHUMANE ACTS’

21. As described in paragraph 6 above, the SCSL was the first international criminal tribunal to judicially consider forced marriage as an ‘other inhumane act’. Initially, in the SCSL’s first forced marriage case, a majority of the SCSL Trial Chamber dismissed the ‘other inhumane act’ charge on the grounds that forced marriage was “completely subsumed” under the sexual slavery charge and therefore redundant.<sup>59</sup> However, the SCSL Appeals Chamber overturned the SCSL Trial Chamber, holding that forced marriage qualifies as an ‘other inhumane act’ and is not subsumed by the charge of sexual slavery.<sup>60</sup> The SCSL Appeals Chamber described the inhumane act of forced marriage 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>61</sup> This description does not create elements of crime. Rather, it describes one of the elements of ‘other inhumane acts’: “great suffering, or serious injury to body or to mental or physical health”.<sup>62</sup>

22. The SCSL Appeals Chamber’s approach was subsequently followed in the RUF *Sesay et al.* Trial Judgment, which concentrated on evaluating whether forced marriage satisfied the elements of an ‘other inhumane act’ and concluded that it did.<sup>63</sup> While the RUF *Sesay et al.* Trial Judgment used language usually reserved for elements of crime – for example, identifying the *actus reus* of forced marriage as

<sup>58</sup> [Ongwen Trial Judgment](#), para. 2751.

<sup>59</sup> [AFRC Brima et al. Trial Judgment](#), para. 713. For an analysis of this reasoning, see [Valerie Oosterveld, “Forced Marriage: Terminological Coherence and Dissonance in International Criminal Law”](#) (2019) 27(4) William & Mary Bill of Rights Journal 1263-1282, pp. 1266-1267.

<sup>60</sup> [AFRC Brima et al. Appeal Judgment](#), para. 202. See also paras. 199-203.

<sup>61</sup> [AFRC Brima et al. Appeal Judgment](#), para. 196.

<sup>62</sup> See, for example, the method of analysis in [AFRC Brima et al. Appeal Judgment](#), paras. 198-201.

<sup>63</sup> [RUF Sesay et al. Trial Judgment](#), para. 168.

“the imposition of forced conjugal association”<sup>64</sup> – it made clear that the only elements of crime required to be proven by the Prosecutor were the elements for ‘other inhumane acts’.<sup>65</sup> The RUF *Sesay et al.* Trial Judgment’s approach to forced marriage was upheld on appeal.<sup>66</sup>

23. The SCSL considered evidence of forced marriage in *Prosecutor v. Taylor* under the sexual slavery charges. Forced marriage as an ‘other inhumane act’ was not charged in this case.<sup>67</sup> In *obiter dicta*, the SCSL Trial Chamber said that forced marriage should not be addressed under ‘other inhumane acts’ because the acts were better classified as ‘conjugal slavery’, which was composed of sexual slavery plus other forms of forced labour.<sup>68</sup> This issue was not addressed on appeal, and, as *dicta*, is less persuasive than the SCSL Appeals Chamber’s previous ruling.
24. The ECCC, in the *Nuon Chea and Khieu Samphan* case, affirmed that forced marriage is correctly classified as an ‘other inhumane act’ and that it satisfies its two central elements: (1) the perpetrator must have “caused serious mental or physical suffering or injury” or undertaken an act that “constituted a serious attack on human dignity”; and (2) the act must be of similar gravity to the enumerated crimes against humanity.<sup>69</sup>
25. The ECCC focused on the fundamental right to consensually marry as an additional, distinct element in defining forced marriage. Like the SCSL, the ECCC differentiated traditional or arranged marriages from the non-consensual marriages being prosecuted.<sup>70</sup> The ECCC Trial Chamber found that genuine consent was impossible in Khmer Rouge-enforced marriages given the regime’s coercive environment, threatening death or other punishments for non-

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<sup>64</sup> [RUF Sesay et al. Trial Judgment](#), para. 1295.

<sup>65</sup> [RUF Sesay et al. Trial Judgment](#), para. 168.

<sup>66</sup> [RUF Sesay et al. Appeal Judgment](#), paras. 740 (Sesay), 861 (Kallon), 972 (Gbao).

<sup>67</sup> [Taylor Trial Judgment](#), para. 422.

<sup>68</sup> [Taylor Trial Judgment](#), paras. 424, 427-428.

<sup>69</sup> [Nuon Chea and Khieu Samphan Trial Judgment Case 002/02](#), para. 746.

<sup>70</sup> [Nuon Chea and Khieu Samphan Trial Judgment Case 002/02](#), paras. 3636-3638; [AFRC Brima et al. Appeal Judgment](#), para. 194.

compliance.<sup>71</sup> Victims of forced marriage under the Khmer regime were thereby denied agency to enter into a marriage with the free and full consent of both partners and to exercise their sexual autonomy.

26. While noting that such marriages also facilitated the rape of women by men forced into conjugal relations, the ECCC Trial Chamber was careful to distinguish the ‘other inhumane act’ of forced marriage from rape within forced marriage as two separate crimes against humanity. The ECCC’s conviction of Khmer Rouge leaders was ground-breaking not only in addressing forced marriage as state policy, but also in recognizing both females and males as victims.<sup>72</sup>
27. Drawing on jurisprudence of the SCSL and ECCC, the ICC has charged and convicted forced marriage as an ‘other inhumane act’.<sup>73</sup> It has correctly identified the nature of ‘other inhumane acts’ as residual, and that the Statute cannot enumerate every inhumane act.<sup>74</sup> It recognized that a crime similar in character (in terms of nature and gravity) to other crimes listed in Article 7(1) of the Statute will satisfy the requirements of an ‘other inhumane act’.<sup>75</sup> It has correctly framed the crime of forced marriage as a violation of relational autonomy at its core, plus a constellation of associated rights violations<sup>76</sup> and harms, including to resulting children.<sup>77</sup>

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<sup>71</sup> [Nuon Chea and Khieu Samphan Trial Judgment Case 002/02](#), paras. 3620–3625, 3694, 3688. Sexual intercourse consummating the ‘marriage’ was compulsory and monitored, with refusal leading to rape by militia or husbands. See [Nuon Chea and Khieu Samphan Trial Judgment Case 002/02](#), paras. 3648–3661.

<sup>72</sup> [Nuon Chea and Khieu Samphan Trial Judgment Case 002/02](#), paras. 3625, 3648–3661, 3700, 3684; [Kathleen M. Maloney, “Ending Impunity for Forced Marriage in Conflict Zones: The Need for Greater Judicial Emphasis on the Human Rights of Girls”](#) (2021) 19(2) *Journal of International Criminal Justice* 327-358, p. 344 [see Appendix for full text]. Additionally, the ECCC broke new ground by considered the evidence of a transgendered woman, Sou Sotheavy, who testified about being forced to marry: [Transcript of Hearing on the Substance in Case 002 - 27 May 2013](#), 11-21 at 18.

<sup>73</sup> [Ongwen Trial Judgment](#), para. 2744; [Al Hassan Confirmation of Charges](#), paras. 555–561.

<sup>74</sup> [Ongwen Trial Judgment](#), para. 2745.

<sup>75</sup> [Ongwen Trial Judgment](#), para. 2747.

<sup>76</sup> [Ongwen Trial Judgment](#), paras. 2748-2751. See also [Al Hassan Decision on the Confirmation of Charges](#), para. 554.

<sup>77</sup> [Ongwen Trial Judgment](#), para. 2748. See also [Kathleen M. Maloney, “Ending Impunity for Forced Marriage in Conflict Zones: The Need for Greater Judicial Emphasis on the Human Rights of Girls”](#) (2021) 19(2) *Journal of International Criminal Justice* 327-358, pp. 332, 342-343, 355-356 [see Appendix for full text].

28. Forced marriage results in a range of serious physical and mental harms to the victims, which the Court has correctly summarized.<sup>78</sup> Further, the Pre-Trial Chamber in *Al Hassan* has rightly acknowledged that the violent nature of the crime, the vulnerability of the victims, and the effects of the crime on the physical and mental health of the victims, renders forced marriage equal in gravity to the enumerated crimes against humanity in Article 7(1) of the Statute.<sup>79</sup>
29. The *amici* agree with the Prosecution that a ‘false marriage’ (an undefined term used by the Defence)<sup>80</sup> is not required to be proven.<sup>81</sup> The Pre-Trial Chamber in *Al Hassan* stated that the prosecution is not required to prove that ‘an official or formal marriage’ took place (e.g. a wedding ceremony), but that the situation exists from the subjective perspective of the victim, third parties, and the perpetrator, and of the intention of the perpetrator to consider the couple as married.<sup>82</sup>

## V. THE ‘OTHER INHUMANE ACT’ OF FORCED MARRIAGE IS A CONTINUING CRIME

30. The ‘other inhumane act’ of forced marriage is properly categorized as a continuing crime because it is carried out over time and in multiple locations. The Trial Chamber acknowledged that forced marriage does not consist only of the moment the forced relationship is declared, it endures during the entire period of that relationship: it is about the conjugal association in its entirety.<sup>83</sup>
31. The classification of forced marriage as a continuing crime was also confirmed by the SCSL, where, as in Uganda, victims were obligated to remain in the forced

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<sup>78</sup> [Ongwen Trial Judgment](#), para. 2749. These harms are examined in [Annie Bunting, Heather Tasker and Emily Lockhart, “Women’s Law-Making and Contestations of ‘Marriage’ in African Conflict Situations”](#) (2021) 55(4) *Law & Society Review* 614–633, pp. 620-624 [see Appendix for full text].

<sup>79</sup> [Al Hassan Decision on the Confirmation of Charges](#), para. 650.

<sup>80</sup> [Defence Appeal Brief](#), para. 996.

<sup>81</sup> [Prosecution Response to Defence Appeal Brief](#), para. 568.

<sup>82</sup> [Al Hassan Decision on the Confirmation of Charges](#), para. 556. See also [Melanie O’Brien, “‘Don’t kill them, let’s choose them as wives’: the Development of the Crimes of Forced Marriage, Sexual Slavery and Enforced Prostitution in International Criminal Law”](#) (2016) 20(3) *The International Journal of Human Rights* 386-406, pp. 391-392 [see Appendix for full text].

<sup>83</sup> [Ongwen Trial Judgment](#), paras. 2036, 2752.

relationship either until they escaped or the perpetrator group lost power, a time period that sometimes lasted for years.<sup>84</sup> However, that time period need not be lengthy: in Mali, forced marriages were perceived as temporary, lasting only while the armed group members were physically present in Timbuktu.<sup>85</sup>

32. The Defence argues that Ongwen was not responsible for forced marriages before 4 March 2004,<sup>86</sup> and that, because the Trial Chamber did not specify the date when witness P-0396 became a wife to a member of the Sinia Brigade (whose name is redacted), he is not responsible for that forced marriage.<sup>87</sup> However, given its continuous nature, even if a forced marriage started before 4 March 2004, it would have continued into the time during which Ongwen was Sinia Brigade commander.

## VI. FORCED MARRIAGE CONSIDERATIONS AT THE SENTENCING AND REPARATIONS PHASES

33. The *amici* submit that the Trial Chamber was correct in considering the aggravating circumstances of the intersection of gender and age (youth) in sentencing Ongwen for the ‘other inhumane act’ of forced marriage.<sup>88</sup> Girls and young women are often the target victims of forced marriage, and thus forced marriage is both a gendered and ageist act.<sup>89</sup>

34. In the cases of forced marriage carried out in Sierra Leone, Uganda, and Mali, the SCSL and ICC recognized that many of the victims of forced marriage were girls and young women.<sup>90</sup> They were selected based on gendered assumptions about the

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<sup>84</sup> [RUF Sesay et al. Trial Judgment](#), n. 2621. For an ICC example, see [Ongwen Trial Judgment](#), paras. 2036, 2752.

<sup>85</sup> [Al Hassan Decision on the Confirmation of Charges](#), para. 581.

<sup>86</sup> [Defence Appeal Brief](#), para. 984.

<sup>87</sup> [Defence Appeal Brief](#), para. 989.

<sup>88</sup> [Ongwen Sentencing Trial Judgment](#), para. 287.

<sup>89</sup> [Kathleen M. Maloney, “Ending Impunity for Forced Marriage in Conflict Zones: The Need for Greater Judicial Emphasis on the Human Rights of Girls”](#) (2021) 19(2) *Journal of International Criminal Justice* 327-358, pp. 331, 342-344 [see Appendix for full text].

<sup>90</sup> [RUF Sesay et al. Sentencing Trial Judgment](#), paras. 127-128; [Ongwen Sentencing Trial Judgment](#), paras. 287, 293. See also [Melanie O'Brien, “Gender Dimensions of Forced Marriage in International](#)



role of females for sex and in caregiving, and were subjected to gender-specific forms of violence and ill-treatment.<sup>91</sup> Under the Khmer Rouge, the intersection of gender and youth was also a factor: girls were married as young as 16 years old, while men were at least 20 years old, and more often 25 years or older.<sup>92</sup>

35. Sentencing decisions for the ‘other inhumane act’ of forced marriage must take into account the age-related vulnerability of young victims and the gender-discriminatory nature of the crimes as aggravating factors. In the view of the *amici*, the Trial Chamber correctly took these into account, finding that Ongwen’s gender discriminatory motive for committing forced marriage was an aggravating factor,<sup>93</sup> and that the victims were particularly defenceless due to their young age (as per Rule 145(2)(b) of the Rules). Ongwen’s youngest ‘wife’ was 11 years old when she was ‘distributed’ to him.<sup>94</sup> The recognition of age *and* gender discrimination (and potentially other grounds of discrimination, such as disability, or any of those listed under Article 21(3) of the Statute) allows for a comprehensive approach to harms done in forced marriage.<sup>95</sup>

36. The long-term physical and mental health impacts of forced marriage on victims should also be considered as an aggravating factor in sentencing and in awarding reparations. Victims of forced marriage may experience permanent injury or disability due to the forced physical labour and sexual violence, including mental illness, chronic pain, damage to reproductive health, and an inability to have children.<sup>96</sup> Forced marriage may also lead to the stigmatization of victims and their

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[Criminal Law](#)” in Indira Rosenthal, Valerie Oosterveld, and Susana SáCouto (eds.), *Gender and International Criminal Law* (Oxford: Oxford University Press, forthcoming 2022), pp. 17, 19, 26.

<sup>91</sup> Valerie Oosterveld, “Gender, Enslavement and War Economies: A Case Study from the Special Court for Sierra Leone” in Solange Mouthaan and Olga Jurasz (eds.) [Gender and War: International and Transitional Justice Perspectives](#) (Intersentia, 2019) 147-168, pp. 163-166 [see Appendix for full text].

<sup>92</sup> [Nuon Chea and Khieu Samphan Trial Judgment Case 002/02](#), paras. 3581-3585.

<sup>93</sup> [Ongwen Sentencing Trial Judgment](#), paras. 288, 293.

<sup>94</sup> [Ongwen Sentencing Trial Judgment](#), paras. 287, 293.

<sup>95</sup> In harmony with the OTP’s policies: [Policy Paper on Sexual and Gender-Based Crimes](#) 2014, and [Policy on Children](#) 2016. All consideration of evidence should be gender-sensitive: [Valerie Oosterveld, “Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes”](#) (2009) 17(2) *American University Journal of Gender, Social Policy & Law* 407-430, pp. 419-423.

<sup>96</sup> [AFRC Brima et al. Appeal Judgment](#), para. 199.



children, causing rejection by their families, an amplification of the victims' suffering as a parent, and intergenerational trauma.<sup>97</sup> Victims may never be able to rehabilitate - physically, mentally, or socio-economically - from their experience. This is particularly true for girls, who suffer aggravated harms due to their youth and developmental immaturity, intensifying the severity and irreversibility of their injuries, which include: loss of literacy, loss of status as virgins as well as of marriageability in cultures where these are central to girls' survival, health problems from infertility to incontinence, lack of education, and ostracism.<sup>98</sup>

37. Finally, another aggravating factor is the fact that forced marriage is a severe transgression of cultural norms, resulting in psychological or spiritual suffering of the victims and their communities.<sup>99</sup>

## VII. CONCLUSION

38. The *amici* respectfully submit these views for consideration by the Appeals Chamber.



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Valerie Oosterveld, Professor, University of Western Ontario Faculty of Law,  
on behalf of the abovementioned *amici*

Dated this 22nd day of December 2021  
At London, Ontario, Canada

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<sup>97</sup> [RUF Sentencing Judgment](#), paras. 132-135.

<sup>98</sup> [Kathleen M. Maloney, "Ending Impunity for Forced Marriage in Conflict Zones: The Need for Greater Judicial Emphasis on the Human Rights of Girls" \(2021\) 19\(2\) Journal of International Criminal Justice 327-358, p. 331 \[see Appendix for full text\].](#)

<sup>99</sup> [Sierra Leone Truth and Reconciliation Commission Report](#), Vol. 3(b), Chapter 3, paras. 291-294.