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Pénale
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**International
Criminal
Court**

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THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, President
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 Document

Amicus Curiae pursuant to Rule 103(1) of the Rules of Procedure and Evidence

Source: Dr. Mohammad Hadi Zakerhossein

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. Pursuant to decision ICC-02/04-01/15 A A2 of 24 November 2021 and Rule 103(1) of the Rules of Procedure and Evidence, Dr. Mohammad Hadi Zakerhossein (“the Applicant”) hereby presents his observations as *amicus curiae* with a view to assisting the Appeals Chamber of the International Criminal Court (“the Court”) in the determination of the proper legal interpretation of the crime of forced marriage.

II. Contextual History

2. On 4 February 2021, Dominic Ongwen was found guilty of, *inter alia*, forced marriage as a crime against humanity. The case represented the first conviction for forced marriage in the history of the Court. Earlier, Germain Katanga had been charged of forced marriage.¹ Nonetheless, he was acquitted from all accusations of Sexual and Gender Based Violence, as the Judges did not believe that the sexual violence was part of the attack on the civilian population in the Democratic Republic of Congo.² In addition, Al Hassan Ag Abdoul Aziz, the former de facto chief of the Islamic police in Timbuktu, Mali, has been accused of forced marriage by the Prosecution of the Court.³ However, his case is still ongoing, and it has not led to a conviction yet.
3. From the outset in the Ongwen case, the legal characterization of forced marriage was at the heart of debates. In the confirmation of charges hearing, forced marriage was considered as an inhumane act under Article 7(1)(k) of the Rome Statute. However, the finding was challenged by the Defense arguing forced marriage shall not be classified under the category of other inhumane acts as a new and independent crime, since it is subsumed in the crime of sexual slavery.⁴ Accordingly, the Defense requested the Pre-Trial

¹ ICC, Katanga case, PTC I, Decision on Confirmation of Charges, 14 October 2008, para. 345.

² ICC, Katanga case, TC II, Summary of Trial Chamber’s Judgment of 7 March 2014, para. 75.

³ ICC, Al Hassan case, PTC I, Warrant of Arrest for Al Hassan Ag Abdou Aziz Ag Mohamed, 27 March 2018.

⁴ ICC, Ongwen case, Further Redacted Version of “Defence Brief for the Confirmation of ChargesHearing”, 3 March 2016, para 128-130.

Chamber to refrain from confirming the charge of forced marriage. The Chamber, however, dismissed this request and the charge brought by the Prosecutor was confirmed as an inhumane act. Also in the trial proceedings, forced marriage was labeled as an inhumane act. Again, the Defence appealed the conviction by arguing, *inter alia*, that the Trial Chamber erred in its legal interpretation of the crime of forced marriage, since it “is not a cognizable crime under the Statute”.

4. It deserves to be noted that prior to the ICC’s engagement with forced marriage, the discrepancy in characterization of this practice occurred in the Special Court for Sierra Leone (SCSL) that was the first international tribunal to prosecute forced marriage as crimes against humanity⁵. In the Armed Forces Revolutionary Council (AFRC) case, wherein three senior members of the AFRC were charged of forced marriage,⁶ the majority of Trial Chamber rejected forced marriage as other inhumane acts, and instead they considered it as a sexual crime.⁷ The majority insisted that there is no lacuna in the law which necessitates placing forced marriage under the category of other inhumane acts.⁸ This attitude, however, stood in contrast with the SCSL Appeals Chamber, which held that forced marriage is a distinct inhumane act amounting to crimes against humanity.⁹ The Appeals Chamber stipulated “no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery”.¹⁰ Interestingly, later in the Taylor judgment, the SCSL Trial Chamber found the term forced married as a misnomer.¹¹ Thus, instead of marriage the Chamber used the term conjugal slavery; a term encompassing two forms of slavery, including sexual slavery and enslavement through forced

⁵ Kai Ambos, *Treaties on International Criminal Court: Vol II*, (Oxford University Press, 2014), p. 100.

⁶ SCSL, AFRC case, Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004.

⁷ According to the Judgment, “The Prosecution evidence in the case does not point to even one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery” see: SCSL, AFRC case, Trial Chamber Judgment, 20 January 2007, para. 710.

⁸ Ibid. 713.

⁹ SCSL, AFRC case, Appeals Chamber Judgment, 22 February 2008, paras. 181-185.

¹⁰ Ibid, 132.

¹¹ SCSL, Taylor case, Judgment, 18 May 2012, paras. 425, 427.

domestic labor.¹² In the context of the Court, disagreement on the legal characterization of forced marriage did not arise in the Ongwen case. Previously in the Katanga case, PTC categorized this practice under the label of sexual slavery. According to the Chamber: “sexual slavery also encompasses situations where women and girls are forced into marriage, domestic servitude or other forced labour involving compulsory sexual activity”.¹³ Moreover, in the Al Hassan case, PTC at the time of issuing an arrest warrant against the accused found reasonable grounds to believe that in the context of forced marriage several crimes against humanity cumulatively were committed in Timbuktu, namely sexual slavery, persecution and other inhumane acts.¹⁴ Nonetheless, later in the confirmation of charges hearing, forced marriage was confirmed only as an inhuman act.¹⁵

III. Conceptualization

5. To attach the proper legal characterization to forced marriage under the Rome Statue, the present *amicus curiae*: (i) contemplate the meaning of forced marriage; and (ii) discuss the possibility of prosecuting forced marriage as an inhumane act. The applicant suggests that the principle of fair labeling requires the Court to treat forced marriage as an independent inhuman act and as a separate and distinct crime from sexual slavery.
6. Forced marriage means a marital or marital-like association which at least one of the partners entered into against their will as a result of some form of coercion.¹⁶ According to the ICC Judges, forced marriage implies the imposition of duties that are associated with marriage, regardless of the will of the victim, which includes exclusivity of the conjugal union imposed on

¹² Ibid., para. 430.

¹³ ICC, 14 October 2008, *supra* note 3, para. 431.

¹⁴ ICC, 27 March 2018, *supra* note 5, paras. 100, 94 and 85.

¹⁵ ICC, Al Hassan case, PTC I, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan, 13 November 2019.

¹⁶ Iris Haenen, *Force and Marriage: The Criminalization of Forced Marriage in Dutch, English and International Criminal Law*, Intersentia, 2014, p. 1.

the victim.¹⁷ The SCSL Appeals Chamber offers a similar definition by describing forced marriage as a situation in which the perpetrator through his words or conduct compels a person to serve as a conjugal partner.¹⁸ This practice should be seen in furtherance of a martial policy that women are prized of victory or incentives to fighting men.¹⁹ In the case of Lord's Resistance Army ("LRA"), for instance, the women and girls were first abducted and then were assigned to the members of the group. The assignment was totally at the discretion of the LRA leadership, but generally commanders and other relatively senior fighters had so-called wives,²⁰ and also women were given to soldiers as a reward.²¹

7. Forced marriage does not necessarily require formality. In the imposition of marriage in LRA, there were occasionally formal ceremonies to mark the marriage,²² but there was often no such ceremony.²³ On the contrary, the members of Ansar Dine in Mali used to do some formalities in forcing marriage.²⁴ They made proposals and pay a dowry in exchange of marriage, but the families of the victims were not free to reject the proposal. Indeed, the evidence demonstrates that the parents were threatened into agreeing to marry their daughters and girls were removed by force to the homes of their new husbands.²⁵ Therefore, although there was a *prima facie* consent in some cases, but such a consent was not genuine because of the coercive environment in which the consent was obtained. Trying to integrate the members of Ansar Dine into the local population was a major reason behind the system of forced marriage in Timbuktu.²⁶

¹⁷ ICC, 4 February 2020, *supra* note 8, p. 2748. And, ICC, 13 November 2019, *supra* note 11, para. 555.

¹⁸ SCSL, AFRC case, Appeals Chamber Judgment, 22 February 2008, paras. 196.

¹⁹ Eboe-Osuji, International Law and Sexual Violence in Armed Conflict, Nijhoff, 2012, p. 221.

²⁰ ICC, 4 February 2020, *supra* note 8, para 2230.

²¹ *Ibid.*, para. 2225.

²² ICC, 4 February 2020, *supra* note 8, para. 2207.

²³ *Ibid.*, p. 803.

²⁴ According to the PTC, marriage served as bridges intended to legitimize sexual abuses and needs. ICC, Al Hassan case, 13 November 2019, *supra* note 11, para. 571.

²⁵ ICC, 27 March 2018, *supra* note 5, para. 82.

²⁶ *Ibid.*, para. 83.

IV: Forced Marriage as Result or Process

8. There are two approaches to the nature and essence of forced marriage. Some argue that the ICC should focus on the result and nature of the forced marriage, namely enslavement.²⁷ Others, as the ICC judges, the manner and process in which this result is obtained, namely marriage. This approach considers forced marriage as a crime that is predominantly social and cultural. For instance, forced marriage From this perspective, international criminal justice intends to protect the value of freedom in forming family and marriage, though in a Western understanding.²⁸

V: Fair Labelling

9. The Applicant rejects the Defense' stand on the categorization of forced marriage. The absence of its name in the legal texts applicable to the Court does not mean that forced marriage cannot be prosecuted independently. On the contrary, forced marriage evidently belongs to the Paragraph K category as a residual clause whose aim is to support those types of victimization that have not been explicitly referred to in the Rome Statute. The Court shall prosecute forced marriage under the Paragraph 7 category to indicate that using marriage as a shield does not allow the perpetrators to escape justice, but it is an independent crime *per se*. Principle of fair labeling requires the Court to treat forced marriage independently and as a separate and distinct crime from sexual slavery. Labelling functions as a message, and as such it shall fairly represent harm inflicted upon victims and the nature of the conduct concerned and its gravity. Categorizing forced marriage as sexual violence may silence the voice of those victims whose suffering is graver than adverse impacts of sexual violence. Forced marriage does not only target the sexual integrity of victims, but it also violates the fundamental right to free marriage. Contrary to regular marriage that creates a status based on a consensual and contractual

²⁷ Haenen, *supra* note 21, p. 371.

²⁸ For the sociology of marriage see: *Ibid.*, pp. 14-16.

relationship,²⁹ forced marriage is the imposition of the marital status. It implies that the practice is not consent-based and the victim cannot refuse.³⁰ As a consequence, forced marriage violates the right to marry with the free consent, as a fundamental right recognized by various international human rights instruments.³¹ In forced marriage, the victim has to live against her will with another person.³²

10. Expressive function of international justice supports adopting an independence-oriented approach to forced marriage. In its case selection, the ICC functions with the guidance of thematic prosecution doctrine.³³ Thematic prosecution orients cases based on the criminal themes. Expressivism determines the main aim of the Court's intervention as norm-setting and norm projection. Based on this mandate, thematic prosecution guides the Prosecutor to prioritise a specific criminal theme and a specific category of crimes in order to promote the prosecution of those crimes. Such prioritisation is justifiable because those themes are generally under-prosecuted and do not trigger the judicial initiatives at the national level. Indeed, these themes of criminality are surrounded by a thick culture of impunity that needs the Court's intervention to be shattered. It is in particular the case regarding forced marriage, because the victim is deprived of legal remedies for those crimes committed against her within the marriage such as abuse or marital rape because many countries do not consider these acts criminal.³⁴ Values that should be protected by prosecuting forced marriage differ from what is protected by sexual slavery. Forced marriage violates the basic right to consensually marry and

²⁹ Ibid., para. 2274.

³⁰ Ibid., para 2217.

³¹ Article 16(2) of the Universal Declaration of Human Rights Article 23(3) of the ICCPR, And Article 10(1) of the ICESCR; Article 1(1) of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages; Article 19(i) of the 1981 Islamic Declaration of Human Rights.

³² Asite Dumbryte, *Till Death do Us Part: Forced Marriage as an International Crime*, 2013, p 21.

³³ See: Mohammad Hadi Zakerhossein, *Situation Selection Regime at the International Criminal Court*, Intersentia, 2017, pp. 231-239.

³⁴ Dumbryte, *supra* note 30, p 21.

establish a family.³⁵ This practice against the free and full consent of individuals that must be protected in both time of war and peace. In this regard, forced marriage may include the so-called arranged marriages, which has been defined as a “contractual agreement, written or unwritten, between two families, rather than individuals”.³⁶ As the Prosecution’s expert in the AFRC case explains, arranged marriage is in violation of international human rights norms, but it is not criminal in nature, unlike forced marriage.³⁷ Nonetheless, some degree and sort of coercion is used, arranged marriage will become a forced marriage.³⁸ Therefore, the practice of forced marriage should be independently prosecuted to show that the very freedom in establishing a family and entering into marriage as an individual value is protected by international criminal law, even if this imposition is covered and prettified by the name of marriage. In the forced marriage practice, the concept of marriage is used to legitimize the status that leads to suffering “trauma and stigma beyond that caused by being a rape victim alone”.³⁹ On the contrary, sexual slavery violates the physical or sexual integrity and personal liberty that has a narrower scope than forced marriage. Covering the practice of forced marriage with the label of sexual slavery does not completely present the nature of the practice. Therefore uncovering the illegal nature of forced marriage properly requires labeling it properly.⁴⁰ From this perspective, the Court insists that the use of term wife in forced marriage is deliberately used that represent a psychological manipulation.⁴¹

³⁵ ICC, 4 February 2020, *supra* note 8, para. 94.

³⁶ AU Zaidi and M. Shuraydi, Perceptions of Arranged Marriage by Young Pakistani Muslim Women Living in a Western Society, *Journal of Comparative Family Studies* (2002), p. 496.

³⁷ *SCSL*, *AFRC* case, Opinion by Justice Sebutinde, 20 June 2007, para 12. For the opposing opinion: see: Nicholas Goodfellow, The Miscategorization of Forced Marriage as a Crimes against Humanity by the Special Court for Sierra Leon, *International Criminal Law Review*, 2011, pp. 831-867.

³⁸ See: Haenen, *supra* note 21, pp. 33-35.

³⁹ ICC, 4 February 2020, *supra* note 8, para. 2750.

⁴⁰ P 52, Master Thesis

⁴¹ ICC, 13 November 2019, *supra* note 11, para. 555.

VI: Forced Marriage as Other Inhumane Acts

11. The crime of other inhumane acts is committed, when the following two elements are fulfilled:

- a) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health;
- b) Such act was of a character similar to any other act referred to in Article 7(1) of the Statute.⁴²

Article 7(1) (k) of the Statute is a residual category of crimes against humanity.⁴³ This residual clause was deliberately included in the Rome Statute, because exhaustively enumerating every inhumane act at the time of the Statute's adoption was impossible.⁴⁴ The ICC is first and foremost a permanent judicial institution, and its permanency requires ability to prosecute untouched crimes at the time of drafting the Statute in order to enable the Court to achieve its main aim and function, namely combatting impunity. Therefore, the other inhumane acts category seems to be an umbrella,⁴⁵ which includes an open-ended list of acts that may amount to crimes against humanity because of the great suffering and serious injuries caused by them. The international jurisprudence suggest many examples of inhumane acts, such as serious beatings and requiring persons to witness killings of others.⁴⁶ Forced marriage is also an act that has been recognized by many jurisprudence as an inhuman act amounting to crimes against humanity.⁴⁷

12. A conduct, such as forced marriage, should meet two requirements to fall under the category of other inhumane acts. First, it should inflict great

⁴² Elements of Crimes, Article 7(1)(k).

⁴³ ICC, Muthaura case., Public Redacted Version Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 269.

⁴⁴ ICTY, Trial Chamber, Kupreškić case, Judgement, 14 January 2000, para. 563

⁴⁵ ICTY, Banović case, Sentencing Judgment, 28 October 2013, para 38.

⁴⁶ ICTY, Tadić case, Judgment, 7 May 1997, paras .726, 730.

⁴⁷ ECCC, Trial Chamber, Khieu Samphan case, Judgment, 16 November 2018, parass 740-49. And, SCSL, Appeals Chamber, Brima case, Judgment, 22 February 2008, paras 197-201.

suffering or serious injury to body or to mental or physical health. This is a question of fact.⁴⁸ Secondly, the conduct should not fall under any other category referred to in Article 7(1). As a residual category, it is a necessary condition that crime of other inhuman act under Article 7(1)(k) should not be the same as one of the enumerated acts, with an identical character in terms of its nature, harm suffered and protected interests involved.⁴⁹ Indeed, acts falling paragraph K have to be essentially distinct from those acts referred to in Article 7(1) (a)-(j). However, such a distinction is not absolute, because according to Elements of crimes such act should be nonetheless similar to other enumerated crimes in Article 7. The similarity in character refers to the nature and gravity of the act.⁵⁰ Sexual slavery and persecution are two titles that seem to be identical to forced marriage, but they do not.

13.V: Forced Marriage is Distinct from Sexual Slavery

14. There are some distinct features that distinguishes forced marriage from sexual slavery, in spite of some similarities between these two kinds of crimes. First, sexual slavery is an act of sexual nature, whereas forced marriage is broader than a sexual act and has social and domestic dimension too. It is true that in the context of forced marriage the victim is sexually enslaved by the perpetrator. For instance, abducted women and girls by the LRA members were forced into sexual intercourse.⁵¹ Nonetheless, forced marriage is not imposed only to secure a sexual relationship but to put the victim under many other obligations, including household chores and respect for traditions.⁵² As such, forced marriage should be seen as a gender-based crime rather than sexual offence because it contains both

⁴⁸ ICC, Ongwen case, PTC II, Decision on the Confirmation of Charges against Dominic Ongwen, 23 March 2016, para 88.

⁴⁹ ICC, 4 February 2020, *supra* note 8, para. 2746.

⁵⁰ Elements of Crimes, footnote 30.

⁵¹ ICC, , 4 February 2020, *supra* note 8, para. 3080.

⁵² ICC, 13 November 2019, *supra* note 11, para. 559.

sexual and non-sexual elements.⁵³ It is in contrast with the idea of those judges at the STCL who argued that forced marriage has an inherent sexual element that dominates the other elements therein.⁵⁴ Sexual element is inherent in forced marriage but its dominancy is doubtful. As the PTC states in confirming the charges against Al Hassan, forced marriage inflicts suffering and prejudices desired goals beyond just having sex.⁵⁵ Indeed, it is another distinctive feature of forced marriage: the harm experienced by the victim that is separate and additional to and broader from one borne by the victims of sexual slavery. The main harm suffered as a result of forced marriage resided in stigmatization that is a social concept and hampers recover and reintegration into society of the victim.⁵⁶ ICC judges have enumerated a wide range of suffering endured by the victim of forced marriage. Accordingly, forced marriage has various social, ethical and religious effects, which have a serious impact on the victim's physical and psychological well-being.⁵⁷ Moreover, the harm caused by forced marriage results in "being ostracized from the community, mental trauma, the serious attack on the victims' dignity".⁵⁸ As recognized by the Extraordinary Chambers in the Courts of Cambodia, the harm caused by forced marriage has a degree of gravity that is comparable to that of other crimes against humanity.⁵⁹ It means that the gravity threshold predicted in Article 7(1)(k) is met,⁶⁰ particularly because of the lack of choice of spouse or when to procreate and stigma.⁶¹ Moreover, the SCSL Appeals Chamber had already identified a number of harms associated with forced marriage including forced domestic labor such as cooking, forced reproductive work such as

⁵³ See: Valerie Oosterveld, *Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties*, *Journal of International Law & Humanitarian Legal Studies* (2011).

⁵⁴ See AFRC Decision on Motion for Judgment of Acquittal Pursuant to Rule 98, para 16.

⁵⁵ ICC, 13 November 2019, *supra* note 11, para. 553.

⁵⁶ *Ibid.*, para. 555.

⁵⁷ ICC, 4 February 2020, *supra* note 8, para. 2748.

⁵⁸ *Ibid.*, para. 2749.

⁵⁹ ECCC, Case 002 Closing Order, 15 September 2010, para. 1443.

⁶⁰ SCSL, AFRC case, Trial Chamber Judgment, 20 January 2007, para. 710.

⁶¹ ICC, 13 November 2019, *supra* note 11, para. 560.

forced child-rearing and serious punishment for failure to carry out these tasks.⁶² It implies that an independent title is needed to cover the whole suffering caused by forced marriage.

15. The essential element of the crime of sexual enslavement is the exercise of ownership over a person, but forced marriage does not necessarily embrace such an element, because it implies the imposition of a conjugal association.⁶³ This conjugal association implies some measure of reciprocity because in this relationship husband would protect the wife and provide her with food and what is necessary for survival.⁶⁴ It is true that “involuntary servitude, even if tempered by human treatment, is still slavery”,⁶⁵ but calling such a relationship marriage gives the so-called wife some flexibility and freedom that makes it distinct from pure and classic slavery.

16. A distinctive element that makes a difference between forced marriage and sexual slavery is the element of exclusivity of forced conjugal imposed that is absent from sexual slavery.⁶⁶ In sexual slavery, the victim is seen as an object under possession who could be easily and widely distributed and shared with others. It is in contrast with forced marriage that implies an exclusive arrangement. Forced marriage could be seen as a quasi-institution regulated by a specific set of rules.⁶⁷ The main rule is the general prohibition of any sexual relation outside so called marriage.⁶⁸ The violation of this well-known rule was punished severely.⁶⁹

Conclusion

17. Taking of brides by the victors is a common occurrence during conflicts.⁷⁰ Despite the prevalence of forced marriage in the present time, it is not a

⁶² AFRC Appeals Judgment, para 190-200.

⁶³ ICC, 4 February 2020, *supra* note 8, para. 2750.

⁶⁴ SCSL, AFRC case, Trial Chamber Judgment, Dissenting Opinion of Justice Doherty, para. 49.

⁶⁵ ICTR, Kunarac case, Appeals Chamber Judgment, para. 123.

⁶⁶ ICC, 4 February 2020, *supra* note 8, para. 93.

⁶⁷ *Ibid.*, para. 2202.

⁶⁸ *Ibid.*, para. 2281.

⁶⁹ *Ibid.*, para. 2285.

⁷⁰ Haenen, *supra* note 21, p. 3.

specific crime in the Rome Statute yet. Instead, this practice is categorizes as other inhumane acts and should be refrained from subsuming into sexual slavery. Although forced marriage embraces sexual dimensions and results in repeatedly rape of the victim, due to two main reasons it should be considered independently. First, harm caused by forced marriage goes beyond that suffering arose from sexual violence. Second, forced marriages is an enslavement laundering process to conceal the illegality of the imposition of marriage and to show that the enslavement is clean. The focus of prosecuting forced marriage as a distinct crime is its concealing and laundering process, instead of its sexual consequences. Various doctrines support the Court's approach to labeling forced marriage, including fair labeling, thematic prosecution and expressive mandate of the Court. Prosecuting forced marriage under paragraph K of Article 7 is not only a matter of naming but it delivers a wide range of messages that are necessary for ending the culture of impunity.



Dr Mohammad Hadi Zakerhossein

Dated this 20 December 2021

At Tehran, Iran

At [place, country]

