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THE SPECIAL COURT FOR SIERRA LEONE: INSTIGATING INTERNATIONAL CRIMINAL LAW'S CONSIDERATION OF FORCED MARRIAGE

Valerie Oosterveld*

The Special Court for Sierra Leone (SCSL) adopted a significant new legal approach when it investigated, prosecuted, and convicted individuals for forced marriage as a gender-related violation of international criminal law. In *The Legal Legacy of the Special Court for Sierra Leone*, Prof. Charles Jalloh discusses how the SCSL addressed the situation of Sierra Leonean “bush wives”—girls and women who were held in captivity during the civil war, “without consent or choice,” and assigned to serve, sexually and through domestic work, their soldier “husbands.”¹ The SCSL’s Prosecutor investigated and prosecuted the violations committed against “bush wives,” categorizing them as the crime against humanity of “other inhumane acts.”² As part of this process, the Office of the Prosecutor consulted with former “bush wives,” who indicated that they wanted the crime to be labelled “forced marriage,” as they felt that this term accurately described the harms they suffered.³ The SCSL’s Appeals Chamber, in the Armed Forces Revolutionary Council (AFRC) case, defined forced marriage as “a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim.”⁴ This definition,

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¹ CHARLES C. JALLOH, *THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE* 150, 162 (2020).

² Prosecutor v. Brima, Case No. SCSL-2004-16-PT, Further Amended Consolidated Indictment, ¶¶ 51–57 (Feb. 18, 2005); Prosecutor v. Sesay, Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment, ¶ 60 (Aug. 2, 2006).

³ Valerie Oosterveld, *The Special Court for Sierra Leone: Initial Structural and Procedural Decisions on Sexual and Gender-Based Violence*, 46 *CAMBRIAN L. REV.* 131, 145–47 (2015–2016).

⁴ Prosecutor v. Brima, Case No. SCSL-04-16-A, Judgment, ¶ 195 (Appeals Chamber Feb. 22, 2008). This approach was also endorsed in Prosecutor v. Sesay, Case No. SCSL-04-15-A, Judgment, ¶ 735 (Appeals Chamber Oct. 26, 2009). Note, however, that the Trial Chamber of the ECCC stated: “The Chamber notes that the term ‘forced marriage’ has been used in international jurisprudence to cover a range of different factual circumstances. The Chamber is not satisfied that there exists a common understanding of this label.” Prosecutor v. Nuon Chea (*ECCC Case 002/02 Trial Judgment*), Case 002/02 Judgment, Case No. 002/19-09-2007/ECCC/TC ¶ 743 (Nov. 16, 2018).

and the SCSL's subsequent analysis of—and convictions for—forced marriage in the Revolutionary United Front (RUF) case, has had a significant and lasting impact on the understanding of forced marriage under international criminal law (ICL).⁵

The SCSL's recognition of forced marriage as a violation of international criminal law subsequently prompted two significant developments within the field. First, it led to the prosecution of forced marriage as an international crime in the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Court (ICC). Second, it led to introspection within the international criminal law community, creating a deeper understanding of the harms stemming from forced marriage, and raising questions about the content of, and label for, the violation. These developments will be examined in turn.

The SCSL's groundbreaking jurisprudence on forced marriage has been referred to and relied upon in two tribunals. The ECCC prosecuted individuals for forced marriage committed during Cambodia's Khmer Rouge regime.⁶ Many men and women were forced by Khmer Rouge state officials to marry in mass ceremonies, without choice of spouse, and subsequently coerced to have sex and procreate.⁷ The Trial Judgment analyzed forced marriage through the category of other inhumane acts, following the example set by the SCSL.⁸ The final Trial Judgment specifically quoted the definition of forced marriage set out by the SCSL's Appeals Chamber,⁹ and ultimately concluded that: "Individuals . . . 'consented' to marriage out of fear, including the fear or threat of being placed in danger; subjected to various accusations including opposing *Angkar*; sent for re-education or refashioning; being moved to another location; or killed. . . . [T]he consent given was not genuine."¹⁰ The accused were convicted of the forced marriage charges.¹¹

⁵ See, e.g., Valerie Oosterveld, *Forced Marriage During Conflict and Mass Atrocity*, in THE OXFORD HANDBOOK OF GENDER AND CONFLICT 240 (Naomi Cahn, Dina Haynes, Fionnuala Ní Aoláin & Nahla Valji eds., 2017); Valerie Oosterveld, *Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties*, 2 J. INT'L HUMANITARIAN LEGAL STUD. 127 (2011) [hereinafter Oosterveld, *Forced Marriage and the Special Court*]; Sara Wharton, *The Evolution of International Criminal Law: Prosecuting 'New' Crimes Before the Special Court for Sierra Leone*, 11 INT'L CRIM. L. REV. 217 (2011); 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, 20 INT'L J. HUM. RIGHTS 386 (2016).

⁶ ECCC Case 002/02 Trial Judgment, ¶¶ 3690–994.

⁷ *Id.* ¶¶ 3690–91, 3696.

⁸ *Id.* ¶¶ 741–49.

⁹ *Id.* ¶ 744.

¹⁰ *Id.* ¶¶ 3620 (footnotes omitted), 3623.

¹¹ *Id.* at Disposition page 2231.

The ICC has charged two accused with forced marriage, also under the crime against humanity of other inhumane acts. In *Prosecutor v. Ongwen*, a former senior commander in the Lord's Resistance Army in northern Uganda was charged with, and convicted of, directly committing, and being responsible for, a system of "forced exclusive conjugal partners," under which abducted girls and women were forced to serve as "wives" within his brigade in the 2002–2005 time period.¹² Citing to the SCSL, the ICC defined forced marriage as "the imposition, regardless of the will of the victim, of duties that are associated with marriage – including in terms of exclusivity of the (forced) conjugal union imposed on the victim – as well as the consequent social stigma."¹³ In *Prosecutor v. Al Hassan Ag Abdoul Aziz*, the accused, 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 directed against the female inhabitants of Timbuktu, Mali, in 2012–2013.¹⁴ The Prosecutor argues that these forced marriages led to repeated rapes, sexual enslavement, and persecution of these women and girls.¹⁵ The *Al Hassan* trial opened on July 14–15, 2020. The SCSL's jurisprudence on forced marriage has played a prominent role in the ICC's consideration of forced marriage in both cases.¹⁶

The SCSL's jurisprudence has also prompted scholars to examine the phenomenon of forced marriage.¹⁷ One issue they have explored is the categorization of victims of forced marriage, since the SCSL defined victimhood largely in female terms¹⁸ and perpetrators as males.¹⁹ The focus

¹² *Prosecutor v. Ongwen (Ongwen Trial Judgment)*, Case No. ICC-02/04-01/15, Trial Judgment ¶¶ 3026, 3071, 3116 (Trial Chamber IX, Feb. 4, 2021); *Prosecutor v. Ongwen (Ongwen Confirmation of Charges)*, Case No. ICC-02/04-01/15, Decision on the Confirmation of Charges against Dominic Ongwen ¶¶ 104–17, 136–38 (Pre-Trial Chamber II, Mar. 23, 2016).

¹³ *Ongwen Trial Judgment*, ¶ 2748.

¹⁴ *Prosecutor v. Aziz*, Case No. ICC-01/12-01/18, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ¶¶ 552–651 (Pre-Trial Chamber I, Nov. 13, 2019).

¹⁵ *Id.* ¶ 563.

¹⁶ *E.g.*, *Ongwen Confirmation of Charges*, at ¶¶ 89, 93.

¹⁷ *E.g.*, Valerie Oosterveld, *Forced Marriage: Terminological Coherence and Dissonance in International Criminal Law*, 27 WM. & MARY BILL RTS. J. 1263 (2019); Neha Jain, *Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution*, 6 J. INT'L CRIM. JUST. 1013 (2008); Jennifer Gong-Gershowitz, *Forced Marriage: A "New" Crime Against Humanity?*, 8 NW. J. INT'L HUM. RTS. 53 (2009); Patricia V. Sellers, *War-time Female Slavery: Enslavement?*, 44 CORNELL INT'L L.J. 115 (2011).

¹⁸ *E.g.*, *Prosecutor v. Brima*, Case No. SCSL-04-16-A, Judgment, ¶ 195 (Appeals Chamber Feb. 22, 2008) ("forced marriage implies a relationship of exclusivity between the 'husband' and 'wife,' which could lead to disciplinary consequences [of the 'wife' by the 'husband'] for breach of this exclusive relationship.").

¹⁹ For example, the Appeals Chamber's definition of forced marriage refers to "the perpetrator or those associated with *him*." *Id.* (emphasis added).

of the SCSL was on the “bush wife” phenomenon created by the RUF and AFRC rebels, in which the victims appearing before the court were girls and women and the perpetrators were identified as male fighters. As a result, the analysis by the SCSL was cast in this paradigm of female victims and male perpetrators, and many commentators have since understandably focused on this scenario, given the large numbers of female victims of forced marriage in conflicts around the world.²⁰ The ECCC presented a different scenario, in which the victims were both male and female, and the perpetrators were male and female officials of the Khmer Rouge.²¹ Subsequent research has indicated that victims and perpetrators of forced marriage may be both female and male. There may be boys and men forced to become “husbands” who are coerced into this role through policies aimed at increasing internal compliance and allegiance to a particular fighting group.²² This research helps to bring further nuance to the understanding of forced marriage victimhood, given that “forced marriage as a mechanism of atrocity may assume different forms in different places.”²³ Therefore, Denov and Drumbl urge a focus on coercion (“imposing a compelled association”) of *all* affected parties.²⁴

Another key issue of contention and discussion among commentators relates to the term “forced marriage.” The *Taylor* Trial Chamber, and experts such as Sellers, advocate replacing the term with a legal label that more accurately captures the harms under consideration, such as “conjugal slavery” or “slavery” *simpliciter*.²⁵ The reasons are twofold: first, in cases

²⁰ E.g., U.N. Secretary-General, *Conflict-Related Sexual Violence: Report of the United Nations Secretary-General*, ¶¶ 14, 20, 31, 37, 40, 70, U.N. Doc. S/2020/487 (June 3, 2020).

²¹ Prosecutor v. Nuon Chea, Case 002/02 Judgment, Case No. 002/19-09-2007/ECCC/TC ¶¶ 3690–94 (Nov. 16, 2018). For an analysis of how the ECCC analyzed male victims of rape within forced marriages in the Case 002/02 Trial Judgment, see Elinor Fry & Elies van Sliedregt, *Targeted Groups, Rape and Dolus Eventualis: Assessing the ECCC’s Contributions to Substantive International Criminal Law*, 18 J. INT’L CRIM. JUST. 701 (2020).

²² Denov and Drumbl identify, through ethnographic research, boys and men who were forced into “marriage” so as to deepen their enmeshment within the Lord’s Resistance Army. Myriam S. Denov & Mark A. Drumbl, *The Many Harms of Forced Marriage: Insights for Law from Ethnography in Northern Uganda*, 18 J. INT’L CRIM. JUST. 349, 357, 359, 361 (2020). The relationships within the forcibly created families were rendered “an expression of captivity.” *Id.* at 361. They also indicate that such individuals may simultaneously be victims and victimizers. *Id.* at 366–67; see also Omer Ajjazi & Erin Baines, *Relationality, Culpability and Consent in Wartime: Men’s Experiences of Forced Marriage*, 11 INT’L J. TRANSITIONAL JUST. 463 (2017).

²³ Denov & Drumbl, *supra* note 22, at 371.

²⁴ *Id.* at 367.

²⁵ Prosecutor v. Taylor (*Taylor Trial Judgment*), Case No. SCSL-03-01-T, Judgment, ¶ 428 (Trial Chamber II May 18, 2012); Sellers, *supra* note 17, at 142. See also Zawati, who proposes “marital slavery” as an alternative label. HILMI ZAWATI, FAIR LABELLING AND THE DILEMMA OF PROSECUTING GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL TRIBUNALS 129 (2014). See also Annie Bunting, ‘Forced Marriage’ in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes, 1 CAN. J. HUM. RTS. 165, 179–80 (2012) (arguing for classification of forced marriage as enslavement).

where there is no legal union (such as in the “bush wife” context), they feel that it is a misnomer to refer to the violation as a form of marriage.²⁶ They argue that the reference to “marriage” in these scenarios obscures the fact that the victims are, in many circumstances, enslaved.²⁷ Secondly, they express concern that the reference to “marriage” may unintentionally serve to legitimate patriarchal understandings of marriage, in which women are expected to serve men.²⁸ On the other hand, scholars recognize that there is an important expressive function in the term “forced marriage” for some victims.²⁹

In sum, the SCSL prompted a major shift in understanding in international criminal law. As a result of the SCSL’s analysis and subsequent consideration in other tribunals, forced marriage is comprehended as a multifaceted set of harms. At the same time, the SCSL’s introduction of forced marriage has triggered a deeper examination and questioning by international criminal law scholars and practitioners—a healthy and logical development meant to ensure that the crime is properly identified and labelled.

Note that there is also a debate on the harm that is captured by the term “forced marriage”: should the focus be on the imposition of the status of “marriage” itself, or is it on the constellation of harms that accompany the imposition of this status (such as sexual slavery, domestic slavery, forced pregnancy, forced childrearing, etc.)? See, e.g., Oosterveld, *Forced Marriage and the Special Court*, *supra* note 5, at 143–48.

²⁶ *Taylor Trial Judgment*, ¶¶ 425, 427.

²⁷ Sellers, *supra* note 17, at 142.

²⁸ Oosterveld, *Forced Marriage and the Special Court*, *supra* note 5, at 154–55; Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone’s Rape Victims*, 18 HARV. HUM. RTS. J. 85, 102 (2005).

²⁹ Oosterveld, *Forced Marriage and the Special Court*, *supra* note 5, at 138–41; see also Annie Bunting & Izevbuwa Kehinde Ikimiukor, *The Expressive Nature of Law: What We Learn from Conjugal Slavery to Forced Marriage in International Criminal Law*, 18 INT’L CRIM. L. REV. 331, 349–52 (2018).