

## The Draft *Crimes Against Humanity Convention* and Forced Marriage<sup>1</sup>

### **Recommendation:**

- 1. To add forced marriage as a standalone violation to the list of prohibited acts in Article 2(1) of the draft *Crimes Against Humanity Convention*.**
- 2. If deemed necessary, to add a definition – “compelling a person to enter into a conjugal union with another person by the use of physical or psychological force, or threat of force, or by taking advantage of a coercive environment” – to Article 2(2).**

### **1. Addition of Forced Marriage to Article 2(1)**

Under the crimes against humanity category of ‘other inhumane acts’, acts of forced marriage have been successfully prosecuted at the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the International Criminal Court (ICC). In those cases, forced marriage was classified under the category of ‘other inhumane acts’ because it was not explicitly listed in the statutes of any of those tribunals. **The drafting of the *Crimes Against Humanity Convention* represents an ideal opportunity to rectify this oversight and explicitly recognize forced marriage as a standalone prohibited act.**

In 2009, in *Prosecutor v. Sesay et al.*, the SCSL Trial Chamber convicted the defendants of forced marriage, and this finding was upheld by the Appeals Chamber.<sup>2</sup> This represented the first conviction for forced marriage as an ‘other inhumane act’ crime against humanity under international criminal law. 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>3</sup> This was confirmed by the ECCC Supreme Court

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Note that this brief is based, in part, on insights from: *Prosecutor v. Ongwen*, *Amicus Curiae* Brief on Forced Marriage, ICC-02/04-01/15-1935 (23 December 2021), <https://www.icc-cpi.int/court-record/icc-02/04-01/15-1935>; and Kathleen Maloney, Melanie O’Brien, and Valerie Oosterveld, “Forced Marriage as the Crime Against Humanity of ‘Other Inhumane Acts’ in the International Criminal Court’s *Ongwen* Case” (2023) *International Criminal Law Review* 1-23, <https://brill.com/view/journals/icla/aop/article-10.1163-15718123-bja10157/article-10.1163-15718123-bja10157.xml>.

<sup>2</sup> SCSL, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, paras. 1464, 1473 (hereafter *RUF Sesay* Trial Judgment); SCSL, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, paras. 726, 849, 861-862.

<sup>3</sup> ECCC, *Co-Prosecutors v. Nuon Chea and Khieu Samphân*, Case No. 002/19-09-2007/ECCC/TC, Trial Chamber, Judgment, 16 November 2018, paras. 741, 4172, 4198, 4303-4305.

Chamber in 2022.<sup>4</sup> In 2021, in *Prosecutor v. Ongwen*, the Trial Chamber rendered the ICC’s first conviction for forced marriage, and this was confirmed on appeal in 2022.<sup>5</sup> Over the last 14 years, international courts have consistently concluded that forced marriage constitutes the crime against humanity of ‘other inhumane acts’. These judgments covered forced marriage committed during a time span of more than four decades and in three different contexts. In each case prosecuted, defendants have questioned the validity of recognizing forced marriage because it is not an explicitly listed prohibited act under the crimes against humanity provision of the courts’ respective statutes. Inclusion of forced marriage in the list of prohibited acts would: (1) more directly reflect the gravity and widespread nature of forced marriage in armed conflict and atrocity situations; (2) recognize the strength of the case law described above; and (3) avoid continuous re-litigation on the nature of forced marriage and its status in international criminal law.

We do not recommend adding forced marriage to the list of sexual and reproductive acts in Article 2(1)(g) as it is not only a sexual or reproductive violation, and does not require such a violation, as explained below.

## **2. Addition of a Definition of Forced Marriage in Article 2(2)**

Inclusion of forced marriage in Article 2(1) would likely also require a definition in Article 2(2). To date, the courts have not needed to adopt a definition of forced marriage because they evaluated whether forced marriage met the required elements of ‘other inhumane acts’. However, the ICC’s Pre-Trial, Trial, and Appeals Chambers in *Ongwen* indicated that forced marriage involves two types of unique harm:<sup>6</sup> the violation by the accused of the victim’s relational autonomy, and related human rights violations stemming from the “imposition on the victim of socially constructed gendered expectations and roles attached to ‘wife’ or ‘husband’.”<sup>7</sup>

In the *Ongwen* case, the Appeals Chamber defined forced marriage as: the compulsion of a person “to enter into a conjugal union with another person by the use of physical or psychological force, or threat of force, or by taking advantage of a coercive environment”.<sup>8</sup> This concise and gender-neutral definition, which is based on previous caselaw and is wide enough to encompass different circumstances of forced marriage, is a logical choice for a definition in the *Crimes Against Humanity Convention*.

The *Ongwen* Pre-Trial Chamber articulated the value protected by the charge – “the independently recognised basic right to consensually marry and establish a family” – which is

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<sup>4</sup> ECCC, *Co-Prosecutors v. Khieu Samphân*, Case No. 002/19-09-2007-ECCC/SC, Supreme Court Chamber, Judgment, 23 December 2022, paras. 1444-1591 (detailed analysis of forced marriage harms).

<sup>5</sup> *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber IX, Judgment, 4 February 2021, paras. 3026, 3069, 3116 (hereafter *Ongwen* Trial Judgment); ICC, *Prosecutor v. Ongwen*, Judgment on the appeal of Mr. Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”, Case No. ICC-02/04-01/15 A, Appeals Chamber, Judgment, 15 December 2022 (hereafter *Ongwen* Appeals Judgment), paras. 978-1041.

<sup>6</sup> ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-422-Red [93], Pre-Trial Chamber, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, paras. 92-94 2016 (hereafter *Ongwen* Confirmation of Charges); *Ongwen* Trial Judgment, *supra* note 5, paras. 2748-2751; *Ongwen* Appeals Judgment, *supra* note 5, paras. 1022-1024.

<sup>7</sup> *Ongwen* Appeals Judgment, *supra* note 5, para. 1024.

<sup>8</sup> *Ibid.* (Additionally, as with all crimes against humanity, the contextual elements would apply.)

“distinct from e.g., physical or sexual integrity, or personal liberty”, a view reinforced by the Trial and Appeals Chambers.<sup>9</sup> This right is recognised under international human rights treaties.<sup>10</sup>

**The first and central type of harm – the denial of relational autonomy - involves the assignment of ‘spousal’ status to the victim.**<sup>11</sup> All levels of the Court stressed that the fact that the ‘marriage’ was illegal or not recognised by the laws or customs of the country or society in which the events occurred is irrelevant.<sup>12</sup> The Appeals Chamber stated that the fact of the conjugal union “may be established on the facts of the case including the nature of the relationship between the perpetrator and the victim, as well as the subjective view of the victim, third parties and the perpetrator”.<sup>13</sup> In other words, “[w]hat matters is whether or not a conjugal union was factually imposed on the victims”.<sup>14</sup> The perpetrator must be aware of the factual circumstances that establish the character of the act.<sup>15</sup>

The Pre-Trial, Trial, and Appeals Chambers commented on the consequences of being deprived of relational autonomy: victims suffer social stigma, mental trauma, and a serious attack on their dignity.<sup>16</sup> Stigmatization may result in victims being rejected from their communities.<sup>17</sup> They may also suffer trauma because they bore children as a result of their forced marriage, and their children may also be affected. As the Trial Chamber observed, “[t]o the extent forced marriage results in the birth of children, this creates even more complex emotional and psychological effects on the victim and their children beyond the obvious physical effects of pregnancy and childbearing”.<sup>18</sup>

**The second unique type of harm caused by forced marriage is a range of human rights violations experienced by victims due to the imposition of socially-constructed ‘spousal’ roles, which may differ depending on the context.** These harms are connected with the “duties

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<sup>9</sup> *Ongwen* Confirmation of Charges, *supra* note 6, para. 94. The Trial Chamber agreed that marriage, or a situation akin to marriage, “creates a status based on a consensual and contractual relationship – it is an institution and also an act or rite” that is undermined when it is forced: *Ongwen* Trial Judgment, *supra* note 5, para. 2748. This was reinforced by the Appeals Chamber: *Ongwen* Appeals Judgment, *supra* note 5, para. 1024.

<sup>10</sup> The ICC Appeals Chamber referred to two treaties: *Ongwen* Appeals Judgment, *supra* note 5, para. 1021, referring to the *International Covenant on Civil and Political Rights*, (999 UNTS 171) (1966), Article 23(3) (hereafter ICCPR), and the *Convention on the Elimination of All Forms of Discrimination Against Women*, (1249 UNTS 13) (1979) Article 16(1)(b), as well as the *Universal Declaration of Human Rights*, (UN Doc. 217 A (III)) (1948), Article 16(2). *See also* African Union, *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, Maputo, 11 July 2003, Article 6.

<sup>11</sup> *Ongwen* Confirmation of Charges, *supra* note 6, para. 93. This was also accepted by the trial and appellate levels: *Ongwen* Trial Judgment, *supra* note 5, paras. 2748-2749; *Ongwen* Appeals Judgment, *supra* note 5, paras. 1022-1024.

<sup>12</sup> *Ongwen* Confirmation of Charges, *supra* note 6, para 93; *Ongwen* Trial Judgment, *supra* note 5, para. 2748; *Ongwen* Appeals Judgment, *supra* note 5, para. 1025. *See also* ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18-461-Corr-Red, Pre-Trial Chamber, Rectificatif à la Décision Relative à la Confirmation des Charges Portées Contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 13 November 2019, para. 555.

<sup>13</sup> *Ongwen* Appeals Judgment, *supra* note 5, para. 1025.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, para 1015.

<sup>16</sup> *Ongwen* Confirmation of Charges, *supra* note 6, para. 93; *Ongwen* Trial Judgment, *supra* note 5, paras. 2748-2749.

<sup>17</sup> *Ongwen* Trial Judgment, *supra* note 5, paras. 2748-2749.

<sup>18</sup> *Ibid.*, para. 2748.

that are associated with marriage” and “socially constructed gendered expectations and roles attached to [being a forced] ‘wife’ or ‘husband’”.<sup>19</sup>

Many of those human rights violations are crimes unto themselves. For example, the SCSL referred to 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 placed in a polygamous conjugal situation, forced pregnancy, forced childbearing and childrearing, physical violence, forced domestic labour such as cooking and cleaning, and forced portering.<sup>20</sup> The *Ongwen* Pre-Trial Chamber referred to situations in which the victim is “sexually or otherwise enslaved by the perpetrator”, is restricted in freedom of movement, or is subjected to repeated sexual abuse, forced pregnancy, or forced labour such as forced performance of domestic duties.<sup>21</sup> The Trial Chamber also referred to serial rape and birth of children, physical violence, forced beating and killing of other abductees, and, for those who were Ongwen’s ‘wives’, forced “domestic duties, including cooking, working in the garden, doing laundry, fetching and chopping wood, carrying Dominic Ongwen’s dishes, fetching water, washing, nursing Dominic Ongwen when he was injured and taking things to him”.<sup>22</sup> The Appeals Chamber also added that victims were “placed under heavy guard”, “threatened with death if they tried to escape”,<sup>23</sup> raped, and subjected to physical and psychological violence.<sup>24</sup> However, these duties, roles, and consequences do not, in themselves, necessarily amount to forced marriage, as the denial of relational autonomy is required.<sup>25</sup>

While many of the human rights violations associated with forced marriage amount to international crimes, others do not, such as the violation of the right to health, loss of education, and interruption of family ties.<sup>26</sup> It is also notable that children born of forced marriage experience myriad violations of their human rights, including those rights under the United Nations Convention on the Rights of Child. While the various Chambers of the ICC did not develop these aspects of forced marriage, they did record evidence of associated human rights violations that did not amount to international crimes.<sup>27</sup>

In sum, we recommend taking forced marriage out of the residual ‘other inhumane acts’ category and listing it as a separate violation, and adopting the definition proposed above, which reflects the understanding of forced marriage as developed through international caselaw.

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<sup>19</sup> *Ongwen* Confirmation of Charges, *supra* note 6, para. 93; *Ongwen* Trial Judgment, *supra* note 5, para. 2748; *Ongwen* Appeals Judgment, *supra* note 5, para. 1024.

<sup>20</sup> SCSL, *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008, para. 190. *See also* *RUF Sesay* Trial Judgment, *supra* note 2, paras. 460, 1154-55, 1211-13, 1293, 1295, 1408-11, 1413, 1460, 1468, 1472, 1553.

<sup>21</sup> *Ongwen* Confirmation of Charges, *supra* note 6, para. 92.

<sup>22</sup> *Ongwen* Trial Judgment, *supra* note 5, paras. 205, 208, 209-210, 215, 218, 220, 2748, 2750.

<sup>23</sup> *Ongwen* Appeals Judgment, *supra* note 5, para. 1027.

<sup>24</sup> *Ibid.*, paras. 1027-1028.

<sup>25</sup> *Ongwen* Confirmation of Charges, *supra* note 6, paras. 92-93.

<sup>26</sup> ICCPR, *supra* note 9, Article 17; *International Covenant on Economic, Social and Cultural Rights*, (993 UNTS 3) (1996), Articles 10, 12, 13.

<sup>27</sup> *See, e.g.*, *Ongwen* Trial Judgment, *supra* note 5, paras. 2030-2033; ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Sentence, 6 May 2021, para. 166; ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15 A2, Appeals Chamber, Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled ‘Sentence’, 15 December 2022, para. 363.