

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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REQUEST FOR LEAVE TO SUBMIT *AMICUS CURIAE* BRIEF ON FORCED MARRIAGE

Filed by:

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War: Partnerships for the study of
enslavement, marriage and masculinities”
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Before:

Trial Chamber

Judge NIL Nonn, President
Judge YOU Ottara
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge Claudia FENZ

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I. INTRODUCTION

1. The Applicants are a group of international legal scholars and researchers with expertise on historical and contemporary forms of slavery, including conjugal slavery, forced marriage in war, and sexual and gender-based violence. In 2011, the applicants held an international conference in collaboration with the Special Court for Sierra Leone on the topic of forced marriage in war as a crime against humanity and as a conflict-related form of violence. Since then, this group of researchers has assisted in the legal developments of forced marriage in international criminal law and conducted collaborative, qualitative research through more than 250 interviews on experiences of survivors of forced marriage in the Democratic Republic of Congo, Liberia, Rwanda, Sierra Leone, and Uganda.
2. The Applicants, law professors and social scientists who hold doctorates in law, international relations and in the social sciences have, over the years, individually and collaboratively developed practical expertise and knowledge on the issue of forced marriage as an international crime. The Applicants work with community-based partners and interact with victims in countries that have recorded incidences of forced marriages. Intrinsic and related to the research undertaken by the Applicants over the years, is the development of a trove of materials on forced marriage derived from witness statements, testimonies, and transcripts of proceedings from justice mechanisms that have addressed the crime of forced marriage and its related crimes. This unique legal expertise and comparative research offers the Trial Chamber, we respectfully submit, synthesized information not readily available to the Court or general public.

II. BACKGROUND AND PROCEDURAL HISTORY

3. On 4 April 2014, the Trial Chamber delineated the scope of Case 002/02 by setting out the charges and factual allegations in Case 002/02 against the defendants.¹ Proceedings began on 17 October 2014. Khieu Samphan and Nuon Chea in Case 002/02 are being tried on charges of genocide that took place in Cambodia, forced marriages and rape (nationwide), internal

¹ Trial Chamber, Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014, Case No. 002/19-09-2007-ECCC/TC, E301/9/1.

purges, the treatment of Buddhists, the targeting of former Khmer Republic Officials, and alleged crimes committed at four security centers and three worksites.²

4. This Brief will focus on forced marriages as charged in the indictment. The Applicants will discuss the consensus on the charging and jurisprudence concerned with forced marriage and will present what has been accepted as the constituent factual elements of the international crime of forced marriage as an inhumane act.

III. APPLICABLE LAW

5. Further to Internal Rule 33 of the Extraordinary Chamber in the Courts of Cambodia (ECCC), the Applicants respectfully request leave to submit this *Amicus Curiae* Brief pertaining to forced marriage as a crime against humanity in international law.
6. In its 2015 Decision in the requests for leave to file amicus in Case 002/02, the Trial Chamber noted that, “an *amicus curiae* is traditionally an independent and impartial adviser to the court whose role is simply to inform and not to advocate”.³ Further the Trial Chamber, following earlier jurisprudence, found that since the applicants in those cases were defense counsel before the Chamber, they could not be considered independent and impartial.⁴ We respectfully submit that, by contrast, the current Applicants are independent international researchers providing impartial advice.
7. In earlier interpretations of Internal Rule 33, the Trial Chamber denied applications for *amicus curiae* where they considered themselves adequately informed; where the application would create unnecessary delay; and where the applicants were affiliated with one of the Court’s offices.⁵ With eight years of experience of the participants in the development of the law on forced marriage as a crime against humanity and collaborative work with groups in

² *Ibid.*

³ Trial Chamber, Decision on Requests to file *Amicus Curiae* Briefs or to Participate as Intervener on the Admissibility and Use of Torture Tainted- Evidence (E350/5 and E350/6), 23 June 2015, Case No. 002/19-09-2007-ECCC/TC, E350/7, Para. 5.

⁴ *Ibid.*

⁵ Pre-Trial Chamber, Decision on Request for Leave to File *Amicus Curiae*, 2 October 2009, Case No. 001/18-07-2007-ECCC/OCIJ (PTC02), D99/3/17; Pre-Trial Chamber, Decision on Request for Leave to File *Amicus Curiae*, 4 August 2009, Case No. 002/19-09-2007-ECCC/OCIJ (PTC21), D158/5/1/14; and Supreme Court Chamber, Decision on DSS Request to the Supreme Court Chamber to Invite *Amicus Curiae* Briefs from Independent Third Parties, 3 March 2011, Case No. 001/18-07-2007-ECCC/SC, F16/3.

different countries where forced marriage occurred in their conflicts, the Applicants offer the Trial Chamber unique, unpublished analysis and information.

8. The submission would not create unnecessary delay, we submit, since the full *Amicus Curiae* Brief is ready to be submitted should leave be granted; the Brief can be submitted before the evidence of forced marriage is heard; and, given the timing, the Chamber would not be interrupted in its decision-making process.
9. The International Criminal Court (ICC), under Rule 103 of its Rules of Procedure and Evidence which contains identical provisions with the ECCC's Internal Rule 33, has in several instances fleshed out the applicable principles guiding submission of observations in proceedings before it by interveners. In *Prosecutor v. Laurent Gbagbo*, the ICC Pre-Trial Chamber granted leave to REDRESS to intervene before it on victims' participation, and acknowledged the expertise and knowledge of REDRESS on issues of victims' rights and advocacy.⁶ Using the standards on this decision, the Applicants submit that the present application for leave is admissible because the Applicants offer specific cumulative expertise and experience working with survivors of forced marriage in conflict situations.
10. In another application for leave to submit observations before the Court, the Appeals Chamber of the ICC, denying the request of the Common Legal Representative of the Victims in the afore-mentioned case, noted that the "victims do not indicate what value their observations would add to the submissions before the Appeals Chamber, nor do they state the reasons that would make their participation appropriate under the circumstances."⁷ Contrary to the request made in by the Common Legal Representative of the Victim, the current application adds value to the proceedings in case 002/02 through rich comparative analysis. The Applicants are of the view that its *Amicus Curiae* Brief would be appropriate at this stage of the trial, as the next segment will deal with the charges of forced marriage.

⁶ *The Prosecutor v. Laurent Gbagbo* Case No: ICC-02/11-01/11 (March 8, 2012), Decision on the "Application by Redress Trust for Leave to Submit Observations to Pre-trial Chamber III of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence", Paras. 5 and 8.

⁷ *The Prosecutor v. Laurent Gbagbo* Case No: ICC-02/11-01/11 OA 5 (October 9, 2013), Decision on the "Request by the Common Legal Representative for Leave to Present Observations on Submissions under Rule 103 of the Rules of Procedure and Evidence to be filed by Mr Darryl Robinson, Ms Margaret deGuzman, Mr Charles Jalloh and Mr Robert Cryer", Para. 12.

11. Further, in *Prosecutor v. Jean-Pierre Bemba Gombo*⁸, the ICC Pre-Trial Chamber in granting leave to an intervener to submit observations, endorsed the Court’s statement in an earlier decision which instructed that, the “respective Chamber should take into consideration whether the proposed submission or observations may assist it in the proper determination of the case.” The Applicants submit that the Brief can assist the Trial Chamber in its determination of the legal characterization of forced marriage as a crime against humanity when the international jurisprudence on the issue has been in flux over the past five years.
12. Finally, the ICC often sets time limits within which to receive such observations from interveners and also within which the parties may respond, to avoid undue delay as a result of granting leave to interveners to make observations.⁹ The Applicants stand ready to accept a timeline imposed by the Trial Chamber.

IV. DISCUSSION

13. The Applicants submit that their *Amicus Curiae* Brief will be “desirable for the proper adjudication of the case” because, it will dwell on two pertinent legal issues central to the crime of forced marriage as charged in the indictment in Case 002/02. These issues are summarized below to allow the Trial Chamber to assess the value of such an *amicus curiae* brief. The *Amicus Curiae* Brief will:

- 1) undertake an analysis of the legal characterization of forced marriage as a crime against humanity of other inhumane acts; and
- 2) set out the distinction between forced marriages and arranged marriages.

The Applicants offer the Chamber unique expertise based on comparative, original research on sexual and gender-based violence, forced marriage and international criminal law – at a

⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 (April 9, 2009), (Decision on Application for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence”, para 11 referring to the decision of the Appeals Chamber in Decision on Motion for Leave to File Proposed *Amicus Curiae* Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence”, ICC -01/04-01/06-1289, para. 8.

⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08 (July 17, 2009) “Decision on Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rules 103 of the Rules of Procedure and Evidence”, Paras. 15 and 16; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 (April 9, 2009) “Decision on Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, Paras. 15 and 16.

moment when the theory of indictment and jurisprudence on forced marriage as a crime against humanity is solidifying.

1) Legal characterization of forced marriage

14. The Statute of the ECCC, like other international criminal courts and tribunals, does not contain any provision on forced marriage. Forced marriage has been charged as crimes against humanity of other inhumane acts under article 5 of the ECCC Statute¹⁰ in Case 002/02. Since crimes against humanity were first codified as an offence under article 6(c) of the Nuremberg Charter,¹¹ the phrase “other inhumane acts” has always been part of its provisions as a residual clause to cover other forms of crimes against humanity not specifically elaborated.¹² Over the years, the various international criminal courts and tribunals have recognized several acts and omissions as crimes against inhumanity of other inhumane acts. Some of the acts recognized as crimes against humanity of other inhumane acts include: sexual violence to a dead woman’s body;¹³ sexual violence;¹⁴ mutilation and other types of severe bodily harm, beatings and other acts of violence;¹⁵ and more recently forced marriage in *Prosecutor v. Brima, Kamara & Kanu (AFRC Case)* and *Prosecutor v. Sesay, Kallon and Gbao (Revolutionary United Front) (RUF Case)* by the Special Court for Sierra Leone.¹⁶
15. The ICC Pre-Trial Chamber in *Prosecutor v. Dominic Ongwen*¹⁷ (*Dominic Ongwen’s Case*) endorsed the jurisprudence of the SCSL on forced marriage as a crime against humanity of other inhumane acts, holding that “forcing another person to serve as a conjugal partner may, per se, amount to an act of a similar character to those explicitly enumerated by article 7(1)

¹⁰ Law on the establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

¹¹ *United Nations, Charter of the International Military Tribunal- Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* (“London Agreement”), 8 August 1945.

¹² M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed (The Hague/London/Boston: Kluwer Law International, 1999) pp. 330-368.

¹³ *The Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-T (May 16, 2003) para. 465.

¹⁴ *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, (September 2, 1998) para. 688 and 693.

¹⁵ *The Prosecutor v. Kvočka and others*, Case No. IT-98-30/1-A 28 February 2005 para. 435.

¹⁶ *The Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-A, Appeals Chamber Judgment (22 February 2008) [hereafter AFRC Appeal Judgment], para. 200; *Prosecutor v. Sesay, Kallon & Gbao* Case No. SCSL-04-15-T, Judgment, (2 March 2009) [hereafter RUF Trial Judgment]; paras. 1464, 1473.

¹⁷ *The Prosecutor v. Dominic Ongwen*, Decision on the Confirmation of Charges, ICC-02/04-01/15 (23 March 2016) [hereafter *Prosecutor v. Dominic Ongwen*, Decision on the Confirmation of Charges].

of the Statute and may intentionally cause great suffering, and that forced marriage may, in the abstract, qualify as “other inhumane acts” under article 7 of the Statute.”¹⁸ With the ICC Pre-Trial Chamber’s recent decision in *Ongwen* there is consensus in international criminal law on the charging and conviction of forced marriage as a crime against humanity of other inhumane acts. The *Amicus Curiae* Brief will analyze in detail the underlying decisions, contrary views, and present the arguments leading to the assumption of this international consensus.

16. The fact that forced marriage is not specifically codified as a distinct crime in international criminal law has in certain instances led to its conflation with other gender-based crimes, particularly sexual slavery. However, the jurisprudence of international criminal courts and tribunals has now settled on the charging and prosecution of the crime of forced marriage as a distinct crime with the ICC Pre-Trial Chamber’s recent endorsement in *Dominic Ongwen’s Case* of the decisions of the SCSL in both the *AFRC* and *RUF Cases*.¹⁹

2) The distinction between forced marriage and arranged marriage

17. Should leave be granted to the Applicants, we will explore the factual and legal differences between arranged marriage in times of relative peace and forced marriage under an oppressive regime or in times of armed conflict. The main line of distinction often drawn between forced marriage and arranged marriage is the absence of consent in the former and the presence of consent in the latter.²⁰ This line of distinction based on the presence or absence of consent, however, is often blurred and difficult to draw in peace time. When the victims have not given consent to family members or where such consent was given under duress, it can not be considered free and full consent as prescribed by a plethora of human

¹⁸ *Ibid.*, para. 91.

¹⁹ *Supra*. note 16.

²⁰ [*R (On the application of Quila and another) (FC)(Respondents) v Secretary of State for the Home Department (Appellant)* (2011) UKSC 45, Per Wilson LJ at Para. 9. Two Judges of the Trial Chamber in the *AFRC Case* drew the distinction between forced marriages and arranged marriages, see, *AFRC Trial Judgment*, Separate Concurring Opinion of Justice Sebutinde Appended to the Judgement Pursuant to Rule 88 (C), paras. 10, 12 and *AFRC Trial Judgment*, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), Para. 36. The Appeals Chamber of the SCSL in the *AFRC Case* endorsed the distinction drawn by these two judges see, *AFRC Appeal Judgment*, para. 194.

rights instruments.²¹ The *Amicus Curiae* Brief will present analysis on the international law and practice as to why forced marriages, especially in armed conflict or under an oppressive regime, should be criminalized. Reference, in part, will be made to the provisions on servile marriage as set out in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

18. In conflict situations and under oppressive regimes, the distinction between forced marriage and arranged marriage is easier to draw and tease out because the absence or negation of consent is easier to prove and is implied in such situations. The jurisprudence of international criminal courts and tribunals, albeit largely in relation to sexual violence and related offences, is settled on the issue of lack of consent in situations of conflict or coercive or hostile circumstances. Integral to the examination of consent undertaken by international criminal courts and tribunals are the related concepts of coercion and hostile or coercive circumstances. In *Prosecutor v. Akayesu (Akayesu's Case)*, the Trial Chamber noted that coercion may comprise of physical force and non-physical elements such as “threats, intimidation, extortion and other form of duress which prey on fear or desperation.”²² The Trial Chamber also pointed out that “coercive circumstances are inherent in armed conflicts.”²³

19. The above inference drawn by the Trial Chamber in *Akayesu's Case* of the presence of coercive circumstances in situations of armed conflict has been reaffirmed by both the Trial²⁴ and Appeals Chamber²⁵ of the International Criminal Tribunal for the former Yugoslavia (ICTY) in several cases. The ICTY Appeals Chamber has noted in unequivocal terms, that

²¹ United Nations, General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 16(1) -(2); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS, Vol. 993, Article 10(1); *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS, Vol. 999, Article 23(3); *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, UNTS, Vol. 1249, Article 16(1)(b); *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 10 December 1962, UNTS, Vol. 521, Article 1(1).

²² *The Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, (2 September 1998), para. 688.

²³ *Ibid.*

²⁴ *Prosecutor v. Zejnil Delalić & Ors (Čelebići Trial Judgment)* Case No.IT-96-21-T (16 November 1998), para. 495; *Prosecutor v. Kvočka et al* Case No. IT-98-30/1-T (November 2, 2001) Para. 176 that consent must be given freely; *Prosecutor v. Furundžija* Case No. IT-95-17/1) (December 19, 1998) Para. 271 that any form of captivity vitiates consent; *Prosecutor v. Dragoljub Kunarac* Trial Judgment Case No. IT-96-23-T & IT-96-23/1-T (22 February 2001), para. 646.

²⁵ *Prosecutor v. Dragoljub Kunarac* Appeal Judgment Case No. IT-96-23-T & IT-96-23/1-A (12 June 2002), para 130.

the prevailing circumstances in most cases charged as war crimes or crimes against humanity will be almost universally coercive. And in the opinion of the ICTY, true consent is impossible in such situations.²⁶ The issue of coercive circumstances has also been addressed by the SCSL within the framework of forced marriage and gender based crimes. The Trial Chamber in the *RUF Case* expressed the view that a marked feature of hostile and coercive circumstances is the presumption of the absence of genuine consent to having sexual relations or contracting marriage.²⁷ The *Amicus Curiae* Brief will present an in-depth analysis of international jurisprudence on what factual circumstances constitute a coercive environment where consent is no longer possible.

IV. REQUEST

20. WHEREFORE, the Applicants respectfully request that the Trial Chamber grant leave to submit the proposed *Amicus Curiae* Brief in relation to the legal issues pertaining to forced marriage pursuant to Rule 33 of the Internal Rules of the ECCC within a timeframe set by the Trial Chamber with particular attention to the expeditious discharge of its functions.

Respectfully submitted,


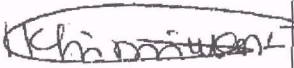
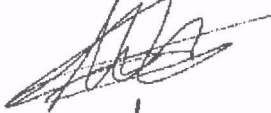
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²⁶ *Ibid.*

²⁷ RUF Trial Judgment, Para. 1471.

002/19-09-2007-ECCC/TC

Respectfully submitted,

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