

Can forced marriage fall under a crime against humanity (CAH) listed under Article 7 (1) of the Rome Statute of the International Criminal Court (ICC)?

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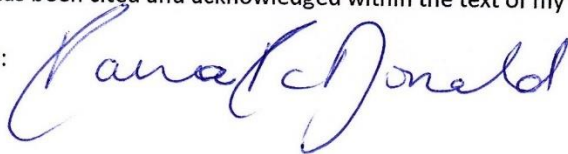
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List of Abbreviations

AFRC	Armed Forces Revolutionary Council
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women 1979
CAH	Crime(s) against humanity
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
FIDH	The International Federation for Human Rights (Fédération internationale des ligues des droits de l'homme)
GBV	Gender-based violence
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights 1966
ICESR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International criminal law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
LRA	Lord's Resistance Army
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic

NGO	Non-Governmental Organization
OPCV	Office of Public Counsel for the Victims
OTP	Office of the Prosecutor
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration of Human Rights 1948
UN	United Nations
UNHCR	Office of the United Nations High Commissioner for Refugees
UNMISS	United Nations Mission in South Sudan
UNODC	UN Office on Drugs and Crime
WIGJ	Woman's Initiative for Gender Justice

Abstract

Title: Can forced marriage fall under a crime against humanity (CAH) listed under Article 7 (1) of the Rome Statute of the ICC (hereafter Rome Statute)?

This thesis analyses the legal characterisation of forced marriage at the ICC and asks can forced marriage fall under a CAH listed under Article 7 (1) of the Rome Statute. Chapter 1 of this thesis will begin with a consideration of the definition of forced marriage. Documentation and evidence which was available to the Preparatory Commission of the ICC with respect to the prevalence of forced marriage in conflict zones will be considered. The purpose, to determine whether there was any intention by the drafters of the Rome Statute to include forced marriage as a CAH under Article 7 (1) of the Rome Statute. Chapter 2 will identify the elements of a CAH and the elements of the CAH of an '*other inhumane act*'. An assessment of the elements of a CAH should enable the author to determine the elements required to prosecute forced marriage as a CAH at the ICC. Chapter 3 will consider the role of prosecutorial discretion in the legal characterisation of forced marriage at the ICC. Finally, the author will conclude by answering can forced marriage can fall under a CAH listed under Article 7 (1) of the Rome Statute.

Acknowledgments

The author would like to thank Dr. Yvonne Daly, Dr. Noelle Higgins and Prof. Gary Murphy without their support and patience this research masters would not have happened. I would also like to thank them for their expertise and insight and for believing that I could finish this thesis despite work and family commitments.

Also, I would like to thank my husband for his never-ending patience and belief in me. Thank you to my children, mother, father and sister for their support.

Introduction

1. The thesis question & topic

1.1 The thesis question

This thesis is about the legal characterisation, if any, of forced marriage at the ICC. Forced marriage is the threat or use of physical force by a perpetrator by his/her words or conduct which force a victim to act as a conjugal partner to the perpetrator.¹ The focus of this thesis is on the jurisprudence of the ICC and reference to other institutions will only be considered where it is relevant to the thesis question.²

This thesis aims to answer the following question:

Can forced marriage fall under a crime against humanity (CAH) listed under Article 7 (1) of the Rome Statute of the ICC (hereafter Rome Statute)?³

This thesis question is divided into four sub-questions:

1. What are the materially distinct elements of forced marriage, if any, at the ICC?
2. Did the drafters of the Rome Statute intend to include forced marriage as a CAH under Article 7 (1) of the Rome Statute?
3. Can forced marriage fall within an existing CAH listed under Article 7 (1) (a)-(j) of the Rome Statute?
4. Can forced marriage fall under an ‘*other inhumane act*’ under Article 7 (1) (k) of the Rome Statute?

The thesis question will be answered once these sub-questions have been dealt with.

¹ This definition is based on the jurisprudence of the SCSL and the ICC. *Prosecutor v Brima, Kamara and Kanu*, Appeals Judgment, Case no SCSL-04-16-A, 22 February 2008 (AFRC Appeals Judgment); *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Pre-Trial Chamber II, Judgement (March 23, 2016) (Ongwen); Iris Haenen, *Force & Marriage: The criminalisation of forced marriage in Dutch, English and international criminal law* (Intersentia. 2014) 1

² *Prosecutor v Lubanga (ICC-01/05-01/06)* Decision Regarding the Practices used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, [44] (Lubanga) Jurisprudence of the ICC suggests that ‘the rules and practice of other jurisdiction, whether national or international, are not as such ‘applicable law’ before the Court beyond the scope of Article 21 of the Statute. More specifically, the law and practise of the ad hoc tribunals, which the Prosecutors refers to, cannot per se form a sufficient basis for importing into the Court’s procedural framework remedies other than those enshrined in the Statute’

³ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998 (Rome Statute)

1.1 The topic: The legal characterisation of Forced Marriage at the ICC

Forced marriage is not listed as an act which amounts to a CAH under Article 7 (1) of the Rome Statute. In order for forced marriage to be prosecuted as a CAH at the ICC it must fall under a CAH already listed under Article 7 (1) of the Rome Statute namely, (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution; (i) Enforced disappearance; (j) Apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Forced marriage is not defined or mentioned in the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence. In such an instance the court can turn to the principles and rules of international law for guidance on how forced marriage might be defined and characterised.⁴ The first court to define forced marriage in international criminal law was the SCSL. The ICC is not bound to follow the jurisprudence of that institution or others nor does the ICC '*consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis*'.⁵ However, the definition of forced marriage as enumerated by the SCSL is relevant to this thesis, not least because it has been quoted and endorsed by the ICC.⁶

Forced marriage was first defined as a CAH by the SCSL.⁷ Like the ICC, forced marriage is not defined by the Statute of the SCSL. It was up to the court to define forced marriage having regard to the crimes listed in its Statute. In the *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) the SCSL defined forced marriage as '*the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the*

⁴ Ibid, Rome Statute, Article 21 (1) (b) and (c); *Prosecutor v Katanga et al* (ICC-01/04-01/07), Decision on the confirmation of charges, 30 September 2008, [508] (*Katanga*) The hierarchy of Article 21 was confirmed in *Prosecutor v Kantanga* where the Pre-Trial Chamber found that '*principles and rules of law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution*'. Schabas; *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 389-390

⁵ *Lubanga* (n 2) [44]

⁶ *Ongwen* (n 1) [89]

⁷ *Prosecutor v. Brima, Kamara and Kanu*, Trial Chamber II, Case SCSL-04-16-T, 20 June 2007 Concurring Opinion of Justice Sebutinde [12] (*AFRC Trial Chamber Concurring Opinion of Justice Sebutinde*)

perpetrator over the victim'.⁸ In the context of the conflict in Sierra Leone it was described as *'the forceful abduction and holding in captivity of women and girls ('bush wives') against their will, for purposes of sexual gratification of their 'bush husbands' and for gender-specific forms of labour including cooking cleaning, washing clothes (conjugal duties)'*.⁹ Forced marriage was deemed to amount to the CAH of an *'other inhumane act'*, under the SCSC Statute.¹⁰ More recent jurisprudence from the SCSL in *Charles Taylor* provides that forced marriage falls under the already recognised CAH of sexual slavery and enslavement.¹¹

The ICC Pre-Trial Chamber in *Prosecutor v. Dominic Ongwen* (hereafter *Ongwen*) defined forced marriage as having *'forced women to serve as conjugal partners'*.¹² The court added that the *'element of exclusivity of this forced conjugal union imposed on the victim is the characteristic aspect of forced marriage'*.¹³ The element of *'exclusivity'* was allegedly absent from the other crimes for which *Ongwen* was charged and therefore, according to the Pre-Trial Chamber of the ICC, forced marriage did not fall under a pre-existing CAH.¹⁴ Presently, the ICC is prosecuting forced marriage as the CAH of an *'other inhumane act'*.¹⁵

One may question the rationale for a thesis question where the ICC has already decided to prosecute forced marriage as the CAH of an *'other inhumane act'*. The question is not moot nor, in the author's view, is the decision in *Ongwen* definitive. In the confirmation of charges hearing in *Ongwen* the Pre-Trial Chamber held that forced marriage *'may, per se'*, amount to an *'other inhumane act'*.¹⁶ The court indicated *'that forced marriage may in the abstract, qualify as "other inhumane acts" under Article 7 of the State rather than being subsumed by the crime of sexual slavery'*.¹⁷ In coming to this conclusion the court considered the jurisprudence of the SCSL and the ECCC, and added that forced marriage, with the additional element of exclusivity *'violates the independently recognised right to consensually marry and*

⁸ *Prosecutor v. Brima, Kamara and Kanu*, Trial Chamber II, Case SCSL-04-16-T, 20 June 2007 Partly Dissenting Opinion of Justice Doherty [36] (AFRC Trial Chamber Partly Dissenting Opinion of Justice Doherty) Cited with approval in *Prosecutor v. Taylor* SCSL-03-01-T, Trial Judgment, 18 May 2012 [424] (*Taylor*)

⁹ AFRC Trial Chamber Concurring Opinion of Justice Sebutinde (n. 7) [12] Cited in *Taylor* Trial Judgment (n 8) 424

¹⁰ AFRC Trial Judgment (n 7); AFRC Appeal Judgement (n 1) *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* SCSL-04-15-T, Trial Chamber 2 March 2009 (RUF Case)

¹¹ *Taylor* (n 8) [427]

¹² *Ongwen* (n 1) [88]

¹³ *Ongwen* (n 1) [93]

¹⁴ *Ibid*

¹⁵ *Ongwen* (n 1)

¹⁶ *Ongwen* (n 1) [91]

¹⁷ *Ibid*

establish a family'.¹⁸ The court's use of language is notable, namely the terms '*may*' and '*in the abstract*' does not suggest that forced marriage would always fall under the CAH of an '*other inhumane act*' under Article 7 (1) (k) of the Rome Statute.¹⁹

The lack of clarity on the characterisation of forced marriage is further illustrated by the 2008 decision in *Prosecutor v. Katanga*.²⁰ Therein, the ICC Pre-Trial Court at that confirmation of charges held that sexual slavery encompasses forced marriage.²¹ At that time no charges were brought before the ICC for forced marriage. According to the court in *Katanga* sexual slavery under Article 7 (1) (g) of the Rome Statute '*also encompasses situations where women and girls are forced into "marriage", domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors*'.²² The Pre-Trial Chamber in *Katanga* never actually considered whether forced marriage fell under the CAH of an '*other inhumane act*' as it was not before them.²³

Without further legal clarification and notwithstanding *Ongwen*, the act of forced marriage, at this juncture, could potentially fall under a CAH listed under Article 7 (1) of the Rome Statute. It appears to the author that different facts surrounding forced marriage may result in a different legal characterisation of forced marriage before the ICC. Arguably certain facts which amount to forced marriage may not fall under any of the crimes listed under Article 7 (1) of the Rome Statute.

It is unclear if *Ongwen* has come to a different conclusion to *Katanga*.²⁴ It's hard to compare the two given that *Katanga* never considered forced marriage as a CAH of forced marriage.²⁵ Both cases do illustrate an intention to consider forced marriage as a CAH under Article 7 (1) of the Rome Statute. In the authors view a consideration of the legal characterisation of forced marriage in this thesis is justified to determine whether forced marriage falls under a CAH under Article 7 (1) of the Rome Statute.

¹⁸ *Ongwen* (n 1) [94]

¹⁹ *Ongwen* (n 1) [91]

²⁰ *Katanga* (n 4) [430-431]

²¹ *Ibid*

²² *Katanga* (n 4) [431]

²³ *Prosecutor v. Ongwen* Decision on the Defence request for leave to appeal the decision on the confirmation of charges ICC-02/04-01/15, 29 March 2016 [37] (*Ongwen* Decision on the Defence Request for Leave to Appeal)

²⁴ *Ibid*, *Ongwen* Decision on the Defence Request for Leave to Appeal (n 23) [37]

²⁵ *Ibid*

2 Rationale and Limitations

2.1 The Rome Statute and its influence, if any, on the legal characterisation of forced marriage

Historically, the international community have prosecuted international crimes via the establishment of ad hoc tribunals. Just as the tribunals were ad hoc so too were the terms of reference or Charters of those tribunals which dictated the rules and crimes which those tribunals could prosecute.²⁶ As time passed, international criminal law evolved, and so too did the nature and type of crimes prosecuted.²⁷ Crimes, such as rape and sexual slavery, which were originally not included the Charter of some ad hoc tribunals, became recognised as CAH, war crimes²⁸ and genocide.²⁹ Similarly, over this period additional or alleged ‘new’ CAH began to evolve or emerge, one of which, forced marriage, is the subject of this thesis.³⁰

²⁶ *The Charter and Judgment of the Nurnberg Tribunal History and Analysis* (Memorandum submitted by the Secretary-General) United Nations- General Assembly International Law Commission, Lake Success, New York 1949, 67 available at http://untreaty.un.org/InternationalLaw/Commission/documentation/english/a_cn4_5.pdf International Military Tribunal for the Far East, Proclaimed at Tokyo, 19 January 1946, amended 26 April 1946, TIAS No. 1589, entered into force 19 January 1946 (IMTFE) Annex, Charter of the International Military Tribunal for the Far East (Tokyo) <http://droitcultures.revues.org/2183>

²⁷ *Draft Code of Offences against the Peace and Security of Mankind* 1954; Text adopted by the International Law Commission at its sixth session, in 1954, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session [54] The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1954, vol. II (*Draft Code of Offences against the Peace and Security of Mankind* 1954..; Draft Statute for an International Criminal Court 1994; Text adopted by the Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1994, vol. II (Part Two) The Draft Statute for an International Criminal Court 1994 failed to list any crimes which amounted to crimes against humanity; United Nations, General Assembly, International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, Yearbook of the International Law Commission, UN Doc. A/51/10 (Volume 2, Part 2), 1996 (ILC Draft Code of Crimes against the Peace, 1996)

²⁸ *Prosecutor v. Kupreškić et al.*, IT-95-16-A, “Appeal Judgment”, Appeals Chamber, 23 October 2001, (“Kupreškić Appeal Judgment”), [697-698] “[u]nlike provisions of national criminal codes or, in common-law countries, rules of criminal law crystallised in the relevant case-law or found in statutory enactments, each Article [...] does not confine itself to indicating a single category of well-defined acts such as murder, voluntary or involuntary manslaughter, theft, etc. Instead the Articles embrace broad clusters of offences sharing certain general legal ingredients. [...]. For instance, murder, torture or rape of enemy civilians normally constitutes war crimes; however, if these acts are part of a widespread or systematic practice, they may also be defined as crimes against humanity”

²⁹ *Prosecutor v Akayesu*, Case No. ICTR-96-4-T (Judgment, September 2, 1998) [496] (*Akayesu*), *Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-95, 12 July 2010. Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 Berkeley J. Int’l Law. 350 (2003). Shayna Rogers, *Sexual Violence or Rape as a Constituent Act of Genocide: Lessons from the Ad Hoc Tribunals and a Prescription for the International Criminal Court*, 48 Geo. Wash. Int’l L. Rev. 265 (2016)

³⁰ Taylor (n 8) [430] “The Trial Chamber considers that unlike the concept of “forced marriage”, as it was presented by the Prosecution in the AFRC and other cases before this Court conjugal slavery is not a new crime with additional elements. Rather it is a practice with certain additional and distinctive features that relate to

The continued use of ad hoc tribunals and the evolving nature of international crimes illustrated the necessity for the establishment of a permanent international court which could prosecute the ‘*most serious crimes*’ of ‘*concern*’ to the international community.³¹ However, unlike the earlier ad hoc tribunals, the ICC, would need the support of much of the international community to come into being.³² The result was the negotiation of the Rome Statute of the ICC, which was signed on the 17 July 1998 and entered into force on the 17th of July 2002.³³

The Rome Statute governs the ‘*jurisdiction*’ and ‘*functioning*’ of the court.³⁴ The ICC, was established to complement national criminal jurisdictions.³⁵ If a state, within the jurisdiction of the court, is unable to or unwilling to prosecute then the ICC may investigate or prosecute crimes within its Statute.³⁶ The ICC has jurisdiction over four of the ‘*most serious crimes of international concern*’ namely, war crimes, CAH, genocide and the crime of aggression.³⁷ This thesis focuses on CAH.

At the heart of the preamble of the Rome Statute lies the principle that certain crimes shock the conscious of mankind and therefore it is the obligation of the international community to prosecute these crimes effectively.³⁸ Only by prosecuting crimes can the international community end impunity and act as a deterrent to prevent further atrocities.³⁹ Bassiouni and Mariniello comment that the prosecution of international crimes can have an impact on international peace and security and can ‘*stop ongoing conflicts*’.⁴⁰ On first appearance, this is an overarching burden; however, there may be small steps which can be taken by the court which can end impunity and encourage deterrence. At the risk of oversimplifying matters, the author asserts that simply prosecuting a crime may have a butterfly effect and bring the

the conjugal aspects of the relationship between the perpetrator and the victim, such as the claim by the perpetrator to a particular victim as his “wife” and the exercise of exclusive sexual control over her, barring others from sexual access to the victim, as well as the compulsion of the victim to perform domestic work such as cooking and cleaning. In the Trial Chamber’s view, these are not new elements that require the conceptualization of a new crime.’ Jennifer Gong-Gershowitz, *Forced Marriage: A “New” Crime Against Humanity?* 8 Nw. J. Hum Rts 53 (2009)

³¹ Rome Statute; Article 1 (n 3)

³² Rome Statute, Article 126 (n 3)

³³ Ibid;

³⁴ Rome Statute, Article 1 (n 3)

³⁵ Preamble Rome Statute; Rome Statute, Article 1 (n 3)

³⁶ Rome Statute; Article 17 (n 3)

³⁷ Rome Statute, Article 5 (1) (a) –(d) & Article 1 (n 3)

³⁸ Triestino Mariniello, *The International Criminal Court in Search of its Purpose and Identity* (Routledge 2015)

³⁹ Preamble Rome Statute; (n 3)

⁴⁰ Triestino Mariniello, *The International Criminal Court in Search of its Purpose and Identity* (Routledge 2015) 14; M. Cherif Bassiouni, ‘*Searching for Peace and Achieving Justice: The Need for Accountability*’ *Law and Contemporary Problems* 59 (1996)

prosecuting of a crime to the attention of the international community. In effect prosecution can act as a warning to perpetrators; the mantra being if you commit an international crime, you may be prosecuted. The ICC with 123 State parties has a reach far greater than the ad hoc tribunals and it can potentially put the prosecution of forced marriage as a CAH on the international agenda.⁴¹

Certainly, one must be cognisant of the ICC's obligation to '*deter*' and '*prevent*' further atrocities in considering how the ICC characterises forced marriage. It is impossible to gauge, within the terms of this thesis, whether the legal characterisation of forced marriage will have a bearing, in real terms, in deterring and preventing forced marriage in the future. What can be considered is the ICC's overarching obligation to consider the principles of deterrence and prevention in deciding how it might characterise the crime of forced marriage.

Radhika Coomaraswamy, the Secretary-General's Special Representative for Children and Armed Conflict stated that '*(e)ffective justice is a deterrent*' and the ICC has been '*instrumental*' in bringing the use of child soldiers in armed conflict before to international attention.⁴² Certainly, the prosecution of enlisting or conscripting child soldiers is an example of the power of the ICC to bring a crime to the international community's attention but it is not directly comparable with the prosecution of forced marriage by the ICC, the subject matter of this thesis. The former is a crime already enscribed within the courts statute. The latter is not.⁴³ Unlike conscripting child soldiers, the crime of forced marriage is not specifically referenced in the Rome Statute.⁴⁴ Therefore, to prosecute forced marriage, as outlined above, the act or offence must fall under an existing CAH listed in the Rome Statute.

2.1 Should the ICC prosecute forced marriage?

At this juncture, it is important to ask that question should the ICC prosecute forced marriage, given it is not specifically listed within the Rome Statute? Not only does the Preamble of the Rome Statute indicate the importance of deterrence and prevention, discussed above, but it also provides that the ICC must be '*mindful that during this century millions of children, women*

⁴¹ Correct as of January 2018 see https://www.icc-cpi.int/news/seminarBooks/2018%2001%20Universality_Eng_pages.pdf last accessed 30th June 2018

⁴² Quote from Radhika Coomaraswamy, the Secretary-General's Special Representative for Children and Armed Conflict, keynote address to an event to mark the Day of International Criminal Justice (17 July 2011) <Ensuring justice through ICC can help deter future atrocities, says UN official> (UN News Centre, 17th July 2011) <<http://www.un.org/apps/news/story.asp?NewsID=39060#.WdOVSWWhSzIU>> accessed 3rd October 2017

⁴³ Rome Statute, Article 8 (2) (b) (xxvi) (n 3)

⁴⁴ *Ongwen* (n 1) [88]

and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'. It is respectfully suggested that forced marriage shocks the conscience of mankind. Ending impunity for forced marriage is in keeping with the overarching aim of the ICC to deter and protect.

The necessity to prosecute is illustrated by the reports of the Secretary General on conflict-related sexual violence which outlines the use of forced marriage in conflict zones. The report considered forced marriage in the DRC and Sudan; both of which are of relevance given that the ICC has prosecuted crimes committed in these jurisdictions. The Secretary General's report from March 2014 illustrates that in the DRC there were 525 incidents of forced marriage as recorded by the *Office of the United Nations High Commissioner for Refugees (UNHCR)*.⁴⁵ The most recent report of the Secretary General on conflict related sexual violence was published in April 2017 and covered the period of January to December 2016.⁴⁶ Conflict related sexual violence for the purpose of the report was deemed to include '*rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict*'.⁴⁷ This definition is in keeping with Article 7 (1) (g) of the ICC Statute, rather than Article 7 (1) (k) the CAH of an '*other inhumane act*'. The 2017 report illustrated that the recorded incidents of forced marriage in the DRC had reduced significantly compared with the figures from the 2014.⁴⁸ In 2016 there were 179 recorded cases of conflict related sexual violence according to the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). These included six forced marriages, 4 cases of sexual slavery and 151 rapes of which 54 were gang rapes. The report recognises that the actual figures are suspected to be much higher than those recorded.⁴⁹ The 2017 report also documents the situation in the South Sudan wherein 577 incidents of conflict related sexual violence were recorded by the United Nations Mission in South Sudan (UNMISS), 157 of these were of forced marriage.⁵⁰ It is not possible to ascertain if the reduction in the statistics in the DRC is because of the prosecution of forced marriage at the SCSL or the ICC. However, it's arguably fair to say that considering

⁴⁵ *Report of the Secretary-General Conflict-related sexual violence S/2014/181* (13th March 2014) available at [file:///C:/Users/maria/Downloads/s_2014_181\(1\).pdf](file:///C:/Users/maria/Downloads/s_2014_181(1).pdf) (last accessed 1st October 2017)

⁴⁶ *Ibid*

⁴⁷ *Report of the Secretary General on Conflict Related Sexual Violence* (n 45) [2], 3

⁴⁸ *Report of the Secretary General on Conflict Related Sexual Violence* (n 45) [19], 12

⁴⁹ *Ibid*

⁵⁰ *Report of the Secretary General on Conflict Related Sexual Violence* (n 45) [60], 18

the preamble of the Rome Statute, prosecuting forced marriage at the ICC ends absolute impunity and has the potential to act as deterrent to the international community. By prosecuting forced marriage, it sends a clear message forced marriage will not be tolerated. Bearing in mind the courts obligation to end impunity, to deter and to prevent, it should prosecute forced marriage as a CAH if it falls under Article 7 (1) of the Rome Statute.

2.2 Why does the legal characterisation of forced marriage at the ICC matter?

In determining whether forced marriage falls under Article 7 (1) of Rome Statute it is important to consider why it matters if forced marriage is characterised as one crime over another. If one legal characterisation is more likely to meet the aims of the Rome Statute; to end impunity, to deter and to prevent the crimes, then the legal characterisation is important to the overall objectives of the ICC.

A characterisation of forced marriage as an ‘*other inhumane act*’ may not be compatible with the human right of the accused to a fair trial and more particularly the principle of legality; namely that legislation should not apply retroactively; statutes and law should be drafted precisely; the law should be applied strictly and the application of the law by analogy should be prohibited and the law should be written and should not be judge made. The latter point was raised by the Defence team in *Ongwen*, although leave to appeal was rejected.⁵¹

Clarity in the legal characterisation of forced marriage is essential. *Nullum crime sine lege, nulla poena sine lege* provides that an accused person cannot be held criminal responsible or punished for an offence which did not exist at the time of its committal. If forced marriage is in fact a ‘*new*’ CAH then an offender may not have known that it was a criminal offence at the time it was committed. Characterising forced marriage as an existing CAH may get rid of this issue as an offender, for example, should have known that the acts of sexual slavery or enslavement were a CAH. The legality characterisation of forced marriage can therefore have a bearing on the rights of the accused and this is something that the ICC may consider in determining how the crime should be characterised. Although, the author must add, that the

⁵¹ Prosecutor v. Ongwen Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision ICC-02/04-01/15, 29th March 2016 (Hereafter Ongwen Defence Request for Leave to Appeal) [40]; Ongwen Decision on the Defence Request for Leave to Appeal (n 23) [36]

CAH against humanity of an ‘*other inhumane act*’ is not a ‘*new*’ crime and in theory it should not breach the principle of legality.⁵²

Similarly, the ICC Office of the Prosecutor (OTP) have indicated they may have regard to a victim voice in determining how it might legally characterise a crime, although there is no obligation to do so.⁵³ The word ‘victim(s)’ appears 40 times within the Rome Statute. The references to the word victim are not a means to play lip service rather the focus on victims within the statute gives due respect to the personal circumstances of the victim, while also facilitating that their voice be heard during criminal proceedings.⁵⁴ A designated Victims and Witness Unit was required to be established under the Rome Statute to ensure that appropriate protection, safety and support is provided to victims and witnesses.⁵⁵ Victims at the ICC can also seek reparations for the crime suffered, although it has not been possible to consider reparations in this thesis.⁵⁶ The voice of the victim plays an important role within the ICC and it may have a bearing on the legal characterisation of forced marriage.⁵⁷

Through a victim’s lens, prosecuting someone for forced marriage reflects the acts, harm and impact the crime of forced marriage has had on the victim.⁵⁸ The SCSL in RUF case commented that ‘*the conjugal association forced upon the victims carried with it a lasting social stigma which hampers their recovery and reintegration into society. This suffering is in addition to the physical injuries that forced intercourse commonly inflicted on women taken as “wives”*’.⁵⁹ Therefore, characterising forced marriage as an ‘*other inhumane act*’ rather than sexual slavery or another CAH may reflect the actual harm done to the victim and may have a deterrent effect. It reflects the full culpability of the offender.⁶⁰

⁵² Prosecutor v. Ongwen Decision on the Defence request for leave to appeal the decision on the confirmation of charges ICC-02/04-01/15, 29 March 2016 [37] (Ongwen Decision on the Defence Request for Leave to Appeal) [37]

⁵³ Moreno-Ocampo, Prosecutor of the ICC, Eightieth Diplomatic Briefing (the Hague, 26th April 2010,) 2; (Ocampo Diplomatic Briefing, 2010) Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber 1 of 7th December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber 1 of 24 December 2007, Situation in Democratic Republic of Congo (ICC-01/04-556), Appeals Chamber, 19 Dec 2008, [52]

⁵⁴ Rome Statute, Article 19 (3) & Article 68(3) of the Rome Statute (n 3)

⁵⁵ Rome Statute, Article 43 (6) (n 3)

⁵⁶ Rome Statute, Article 75 (n 3)

⁵⁷ Ocampo Diplomatic Briefing 2010 (n 52)

⁵⁸ Flavia Lattanzi & William Schabas (editors) *Essays on the Rome Statute of the International Criminal Court* Vol 1 (il Sirente 1999) See Barbara Bedont, *Gender Specific Provisions in the Statute of the International Criminal Court* 183

⁵⁹ *RUF Trial Judgment* (n 10) [1296]

⁶⁰ AFRC Appeal Judgment (n 1) [202]

It could be argued that prosecuting forced marriage as an ‘*other inhumane act*’ does not necessarily reflect the views of the victim and may rather reflect society’s need to define a crime in terms of its impact. Ms. Justice Doherty in her dissenting opinion at the SCSL, said that the crime of forced marriage ‘*is concerned primarily with the mental and moral suffering of the victim.*’⁶¹ However, the victim may not identify the suffering caused by the forced marriage, and as Jennifer Gong-Gershowitz illustrates, the SCSL in the AFRC ‘*Trial Chamber found that not one of the victims testified that “the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental.”*’⁶² This is further illustrated by the fact that one of *Ongwen*’s wives has indicated that she does not want him to be prosecuted.⁶³ Others have expressed concern over his prosecution commenting that the ‘*Ongwen’s trial is unfair because he was abducted as a child and grew up in captivity and whatever he did was not of his wish, but he was ordered to do them.*’⁶⁴ Having regard to the views of the victim in the legal characterisation is not straightforward and the obligation of the ICC to prosecute and deter is arguably easier to objectify in determining the legal characterisation of forced marriage.

This thesis question is justified given the range of factors which can have an impact on the legal characterisation of forced marriage at the ICC.

2.3 Limitations

This thesis focuses on the ICC and the Rome Statute. Reference to other institutions will only be considered where it is relevant to the thesis question.⁶⁵

Reference will be made throughout the course of this thesis to the jurisprudence of the SCSL and to the difference, if any, between the definition or elements of crime of forced marriage at the ICC and the SCSL. A difference between the jurisprudence of the ICC in relation to forced marriage could be due to the different legal structure or Statute of the ICC. However, where

⁶¹ AFRC Trial Chamber Partly Dissenting Opinion of Justice Doherty (n 8) [52] Quoted by Jennifer Gong-Gershowitz, *Forced Marriage: A "New" Crime Against Humanity?* 8 Nw. J. Hum Rts 53 (2009) 68

⁶² Ibid

⁶³ Jacqui Thornton ‘*I fell in love with the man who raped me: Woman’s extraordinary relationship with the Congolese warlord she was forced to marry aged 12*’ (Daily Mail, 16th December 2015) <<http://www.dailymail.co.uk/femail/article-3362183/I-fell-love-man-raped-Woman-s-extraordinary-relationship-Congolese-warlord-forced-marry-aged-12.html#ixzz4vrrvMFLW>> last accessed 18th October 2017

⁶⁴ Lino Owor Ogora *Formerly Abducted Women Say Ongwen’s Trial is Not Justified* (International Justice Monitor, 23rd June 2017) <<https://www.ijmonitor.org/2017/06/formerly-abducted-women-say-ongwens-trial-is-not-justified/>> last accessed 18th October 2017;

⁶⁵ Lubanga (n1) [44]

the statutes of the ICC and the ad hoc tribunals are the same, any difference, may reflect a divergence in the interpretation of those statutory provisions. The overarching obligations of the ICC as outlined in the Rome Statute could result in a difference in interpretation.⁶⁶ Such a difference, if found, could infer the fragmentation, or the breaking up, of ICL.⁶⁷ This thesis does not intend to focus on the fragmentation of ICL in any detail. It is however accepted that fragmentation of ICL may be relevant in terms of impact. Part 1.2 above referred to the impact prosecuting forced marriage can have on ending impunity for forced marriage. For example, if there are different definitions of forced marriage or different elements of forced marriage in ICL this could have an impact on the deterrent effect of prosecuting forced marriage at the ICC.⁶⁸

This thesis will limit itself to a consideration of CAH which fall within the context of international criminal law. In this context international criminal law is limited, in this thesis, to an assessment of international crimes which fall within the jurisdiction of the international tribunals and the ICC. This thesis will not consider arranged marriages or forced marriage as defined by domestic legislation or courts. It was also not possible to consider reparations or cumulative convictions.

3 Methodology and Outline

3.1 Methodology

Doctrinal research founds the basis for this thesis.

⁶⁶ Andrea Carcano, *Of Fragmentation and Precedents in International Criminal Law: Possible Lessons from Recent Jurisprudence on Aiding and Abetting Liability*, Journal of International Criminal Justice, Volume 14, Issue 4, 1 September 2016, Pages 771–792 *Prosecutor v. Brima*, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, SCSL-04-16-PT, 1 April 2004, [20]; Larissa van den Herik and Carsten Stahn *The Diversification and Fragmentation of International Criminal Law* (Brill 2012) 36

When considering the jurisprudence of the SCSL, rather than that of the ICC, it is important to be mindful of the relevance of the jurisprudence of the ad hoc tribunals in any decision making at the SCSL in light of Article 20 (3) of the SCSL Statute which states that the court ‘shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda’. This provision which is notably absent from the Rome Statute.

⁶⁷ C. Wilfried Jenks, *The Conflict of Law-Making Treaties*, BYBIL vol. 30, (1953) 403. Cited in ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006

⁶⁸ Larissa van den Herik and Carsten Stahn *The Diversification and Fragmentation of International Criminal Law* (Brill 2012) 35-37

The ICC is obliged, under Article 21 (1) of the Rome Statute to follow a hierarchy of applicable law when making any decision.⁶⁹ On this basis this thesis, where relevant, will focus on the Rome Statute, the Elements of Crime and the Rules of Procedure of the ICC. Where these are silent, regard will be had to relevant treaties, rules and principles of international law. Finally, it may still be necessary to consider general principles of law which have been derived from domestic law if they comply with the principles enshrined within international law and the courts Statute.

Regard will also be had to the impact of forced marriage on the victims of crime. Bearing this in mind, UN and NGO reports which focus on forced marriage and GBV will be considered.

3.2 Outline

This thesis considers the legal characterisation of forced marriage. The definition of forced marriage is examined in Chapter 1 of this thesis. This Chapter also considers whether the drafters of the Rome Statute intended for forced marriage to fall under a CAH under Article 7 (1) of the Rome Statute. Chapter 2 outlines the materially distinct elements of forced marriage as a CAH at the ICC. It also asks if forced marriage can fall under the CAH of an '*other inhumane act*' under Article 7 (1) (k) of the Rome Statute. Chapter 3 contemplates the role of prosecutorial discretion in the prosecution of forced marriage at the ICC. In the conclusion, the author provides her view on the legal characterisation of forced marriage, if any, under Article 7 (1) of the Rome Statute.

⁶⁹ Rome Statute, Article 21 (n 3)

Chapter 1

Defining forced marriage as a CAH

This dissertation seeks to examine the definition and legal characterisation of ‘*forced marriage*’ before the ICC. It makes sense to begin the examination of this topic with a consideration of the definition of forced marriage at the SCSL and the ICC and an overview of the work of the Preparatory Committee which drafted the Rome Statute and the Elements of Crimes. The latter is necessary to understand the intent of the negotiators and drafters of the Rome Statute and whether there is any evidence that they considered including forced marriage within Article 7 (1) of the Rome Statute. A reference or consideration of forced marriage by the negotiators of the Rome Statute could guide prosecutors, judges and lawyers in the legal characterisation of forced marriage at the ICC.

A Preparatory Committee for the establishment of the ICC was established by the General Assembly Resolution 50/46 in December 1995.¹ They finalised and adopted a text for the court at a Conference in 1998.² At a Diplomatic Conference on the establishment of the ICC it was decided that a Preparatory Commission would be established to draft documentation which was needed for ‘*practical arrangements*’ for the court.³ These included the Rules of Procedure and Evidence and the Elements of Crimes for the ICC.⁴

The Elements of Crimes for the ICC is a comprehensive document which outlines the elements of each crime which can be prosecuted at the court. It includes the elements of genocide, war crimes and CAH.⁵ This thesis only focuses on the latter, CAH as there is no evidence, to date,

¹ Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (2nd edn Oxford University Press 2016) [20] (Schabas, *The International Criminal Court*, 2nd edn); General Assembly, *Establishment of an International Criminal Court* A/RES/50/46, 11th December 1995 (General Assembly, *Establishment of the ICC*, 1995)

² Ibid

³ The Final Act of the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10 Rome, 17th July 1998, [5] available at <http://legal.un.org/icc/statute/finalfra.htm> last accessed 23rd November 2017; Schabas, *The International Criminal Court*, 2nd edn (n 1) [26]

⁴ Ibid

⁵ The Elements of Crimes are reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B. The Elements of Crimes adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010 (International Criminal Court publication, RC/11)

that forced marriage could fall under or satisfy the elements of genocide or a war crime. There is no reference in the Rome Statute or the Elements of Crime to forced marriage. Forced marriage can only be prosecuted as a CAH at the ICC if the act of forced marriage satisfies the materially distinct elements listed in the ICC Elements of Crime of one of the CAH listed under Article 7 (1) of the Rome Statute.

Documentation referencing forced marriage was available to the Preparatory Commission during the negotiation of both the Rome Statute and more so the Elements of Crimes.⁶ So why then was forced marriage not included or mentioned in the Rome Statute? In the author's view, the failure to include forced marriage in the Rome Statute and Elements of Crime poses three scenarios:

First, the negotiators were aware of the act of forced marriage but did not consider it a CAH during the drafting of the Rome Statute and/or Elements of Crimes. If this was the case, then it may have been the intention of the drafters not to include forced marriage within the remit of the ICC. This could suggest that forced marriage does not fall under Article 7 (1) of the Rome Statute.

Secondly, the legislators may not have considered forced marriage as a CAH at the time of the negotiations. In such an instance forced marriage may fall under the CAH of an '*other inhumane act*'.

Finally, the drafters may have believed that forced marriage fell under an existing CAH and therefore, at the time of drafting both the Rome Statute and the Elements of Crimes, there was

⁶ Women's Caucus for Gender Justice in the International Criminal Court, *Recommendations and Commentary for December 1997 Prep. Com.*, Part III: War Crimes, Recommendation 7 (Dec. 1-12, 1997) available at <http://www.iccnw.org/documents/5PrepComRecommWomensC.pdf> (last accessed 24th January 2018) (Women's Caucus for Gender Justice, Dec 1997); Women's Caucus Advocacy in ICC Negotiations, *Recommendations and Commentary for the Elements of Crimes* (Based on the Rolling Text PCNICC/L.5/Rev.1/Add.2) Submitted to the Preparatory Commission for the International Criminal Court March 13, 2000) available at <http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/icc/iccpc/032000pc/elementsannex.html> last accessed 6th November 2017 (Women's Caucus for Gender Justice Submission to the Preparatory Commission, March 13, 2000); Cape Town Principles and Best Practice on the Prevention of Recruitment of Children into the Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa, 1997 (Cape Town Principles) United States Department of State, U.S. *Department of State Country Report on Human Rights Practices 1999 - Ethiopia*, 25 February 2000; Human Rights Watch; *Sierra Leone: Getting Away with Murder, Mutilation, Rape - New Testimony from Sierra Leone* July 1999, Vol.11 No 3(A) available at <https://www.hrw.org/reports/1999/sierra/> (last accessed 22nd November 2017); Human Rights Watch interviews, Freetown, May 4, May 8, and May 22, 1999; Amnesty International; *Sierra Leone: Rape and Other forms of Sexual Violence against Girls and Women 28 June 2000* AI Index: AFR 51/35/00 available at <file:///C:/Users/maria/Downloads/afr510352000en.pdf>;

no need to explicitly reference forced marriage. Such a conclusion inevitably results in forced marriage falling under an existing CAH under Article 7 (1) of the Rome Statute.

In order to ascertain which scenario, if any, is correct, a number of factors must be considered. Part I of this Chapter will outline how forced marriage has been defined and characterised by the SCSL and the ICC. Part II of this Chapter will outline the international instruments, relevant to the definition of forced marriage, which were available to the drafters of the Rome Statute. Part III will consider opportunities missed by the ICC to consider the definition of forced marriage. This Chapter will attempt to ascertain what status, if any, forced marriage had in international criminal law (ICL) prior to the Preparatory Commission of the ICC commencing and completing its negotiations on the Rome Statute and Elements of Crimes. This is relevant given that those working on the Preparatory Commission looked to the ad hoc tribunals to determine the CAH that were included in Article 7 (1) of the Rome Statute.⁷ This will facilitate an understanding of the definition of forced marriage as a CAH at the ICC prior to, and after, its inception. It will help the author to determine if the drafters of the Rome Statute and the Elements of Crimes intended that forced marriage would fall under an existing CAH under Article 7 (1) of the Rome Statute.

I. Towards a definition of forced marriage in ICL

There have been competing views with respect to how forced marriage should be characterised at the SCSL and the ICC. The reason for the divergence is because forced marriage has had different legal characterisations at both the SCSL and the ICC.⁸ There are also different academic opinions as to what is the most appropriate legal characterisation of forced marriage in ICL.⁹

⁷ Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int'l L. 605 (2004), 615 footnote 45 citing Herman von Hebel, *The Making of the Elements of Crimes*, in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, 3, 5 (Roy S. Lee et al. eds., 2001)

⁸ Prosecutor v. Brima, Manara and Kanu, Case No. SCSL-04-16-T Judgment (20th June 2007) (AFRC Trial Judgment) Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-A Judgment (22nd February 2008) (AFRC Appeal Judgment); Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15 T Judgment (2nd March 2009) (Hereafter RUF Trial Judgment); Prosecutor v. Charles Taylor, Case No.: SCSL-03-01-T, Trial Judgment, 18 May 2012 (Hereafter Taylor Trial Judgment); Prosecutor v. Nuon, Leng, Khieu and Ieng, Case No. 002/19-09-2007-ECCC-OCJ Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Pre-Trial Chamber II, Judgement (March 23, 2016) (Ongwen)

⁹ Fionnuala Ní Aoláin, Naomi Cahn, Nahla Valji, Dina Francesca Haynes (editors); *The Oxford Handbook of Gender and Conflict*; (Oxford University Press 2017) See Chapter 18 Oosterveld, 'Forced Marriage During Conflict and Mass Atrocity', 240 (Oosterveld, 'Forced Marriage During Conflict and Mass Atrocity' in the *Oxford Handbook of Gender Conflict*); Annie Bunting, *Forced Marriage in Conflict Situations: Researching and Prosecuting Old Hard and New Crimes*, *Canadian Journal of human Rights* 1, no 1: 165-185 (Bunting, *Forced Marriage in Conflict*

To date this debate has focused on whether forced marriage falls under the CAH of enslavement,¹⁰ sexual slavery¹¹ or an ‘*other inhumane act*’ at the ICC.¹² Article 7 (1) (k) of the Rome Statute defines an ‘*other inhumane act*’ as an ‘*act [sic] of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health*’. If forced marriage is deemed to either fall within the elements of the CAH of enslavement, sexual slavery or an ‘*other inhumane act*’, then the ICC would have jurisdiction over forced marriage.

At this juncture, an outline of the legal characterisation of forced marriage at the SCSL is provided to identify how forced marriage was first defined and characterised by an international court. This will be followed with a consideration of how forced marriage has been defined at the ICC.

a. Defining forced marriage at the SCSL

Forced marriage was first prosecuted as a CAH by the SCSL. Forced marriage was not listed as a CAH under the Statute of the SCSL. In the *AFRC* Trial Chamber (2007) the SCSL prosecutor proffered charges for forced marriage as the CAH of an ‘*other inhumane act*’. Forced marriage will only fall under the CAH of an ‘*other inhumane act*’ if the harm is of a ‘*similar character*’ to other CAH.¹³ The prosecutor in the *AFRC* case identified two types of harm suffered by victims.¹⁴ First, the victims suffered harm due to the effective status of marriage which was placed upon them, in circumstances where they could not and did not consent to it.¹⁵ The harm, which resulted, was the social stigma which followed. The second harm identified was the ‘*physical and psychological harms associated with the rape, forced pregnancy, forced labor, and other duties associated with being a "wife."*’¹⁶ The ‘*harms*’ of

Situations) Annie Bunting, Benjamin N. Lawrance, Richard L. Roberts, edn ‘*Marriage by Force?: Contestation over Consent and Coercion in Africa*’ (Ohio University Press. 2016), See Introduction Something Old Something New (Bunting, et al, Marriage by Force, 2016: Introduction); Frulli, *Advancing International Criminal Law: The Special Court of Sierra Leone Recognised Forced Marriage as a ‘New’ Crime against Humanity*’ Journal of International Criminal Justice (2012) 6, 1022-1042; Jennifer Gong-Gershowitz, *Forced Marriage: A “New” Crime Against Humanity?* 8 Nw. J. Hum Rts 53 (2009) 53-76 (Gershowitz, A ‘New’ Crime Against Humanity, 2009)

¹⁰ Rome Statute, Article 7 (1) (c)

¹¹ Rome Statute, Article 7 (1) (g)

¹² A Rome Statute, Article 7 (1) (k); Elements of Crime, Element No. 3, pg. 12

¹³ *ibid*

¹⁴ Oosterveld, ‘*Forced Marriage During Conflict and Mass Atrocity*’ in the *Oxford Handbook of Gender Conflict* (n 9), 24; Valerie Oosterveld, *Gender and the Charles Taylor Case at the Special Court for Sierra Leone*, 19 Wm. & Mary J. Women & L. 7, 34(2012), 19 (Oosterveld, Gender and the Charles Taylor Case at SCSL, 2012)

¹⁵ *ibid*

¹⁶ Oosterveld, *Gender and the Charles Taylor Case at SCSL*, 2012 (n 14), 18; *AFRC Appeal Judgment* [190]-[191]

forced marriage, presented by the prosecutor, were rejected by *AFRC* Trial Chamber.¹⁷ This may have been because there was no evidence presented to the court in relation to the harm which resulted from a forced marriage. Rather, evidence was provided by witnesses that they were ‘*taken as wives*’. There was no evidence of the harm being linked to being ‘*married*’ to the perpetrator.¹⁸ The *AFRC* Trial Chamber did not accept the proposition of the prosecutor that forced marriage amounted to a CAH of an ‘*other inhumane act*’.¹⁹ The court subsumed forced marriage into the CAH of sexual slavery. In effect, holding that forced marriage was primarily a sexual crime.²⁰

The *AFRC* Appeal Chamber (2008) rejected the Trial Chamber’s decision and accepted the elements put forward by the prosecutor relating to the harm suffered. In fact, the court incorporated them into a definition of forced marriage such that the elements of forced marriage were, according to the *AFRC* Appeal Chamber:

- a. *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*²¹
- b. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “*husband*” and “*wife*,” which could lead to disciplinary consequences for breach of this exclusive arrangement²².

The *RUF* case (2009), the second case to consider forced marriage at the SCSL also considered the use of the term ‘*wife*’.²³ The SCSL in the *RUF* case found that the use of the term ‘*wife*’ was used ‘*with the aim of enslaving the women*’ and using ‘*them like possessions*’.²⁴ The aforementioned language would be associated more readily with enslavement or sexual slavery; however, the SCSL in the *RUF* case followed the jurisprudence of the *AFRC* Appeal

¹⁷ Oosterveld, *Forced Marriage During Conflict and Mass Atrocity* in the *Oxford Handbook of Gender Conflict* (n 9), 243

¹⁸ *Ibid AFRC Trial Judgment* (n 9) [711]-[713]

¹⁹ *Ibid*

²⁰ *AFRC Trial Judgment* (n 9) [711]-[713]

²¹ *AFRC Trial Chamber* (n 9) [195]

²² *AFRC Appeal Judgment* (n 9) [190]

²³ *RUF Trial Judgment* (n 8)

²⁴ Oosterveld, *Forced Marriage During Conflict and Mass Atrocity* in the *Oxford Handbook of Gender Conflict* (n 9) 243; *RUF Trial Judgment* (n 8) [1466]

Chamber finding that forced marriage amounted to an ‘*other inhumane act*’ under the Statute of the SCSL.²⁵

The SCSL reconsidered the characterisation of forced marriage in the *Charles Taylor* case (2012).²⁶ *Taylor* was not charged with forced marriage as a CAH of an ‘*other inhumane act*’.²⁷ Evidence was rather presented to the court of ‘*bush wives*’ to support the CAH of sexual slavery.²⁸ The SCSL in *Taylor* held that forced marriage had been incorrectly defined as an ‘*other inhumane act*’.²⁹ The court was critical of the use of the term marriage as it did ‘*not consider the nomenclature of ‘marriage’ to be helpful in describing what happened to the victims of this forced conjugal association and finds it inappropriate to refer to their perpetrators as ‘husbands.*’³⁰ The SCSL in *Taylor* rather felt that the term forced marriage represented the harm of sexual slavery and enslavement, which included domestic labour.³¹ The court proposed the use of the term ‘*conjugal slavery*’, instead of forced marriage. Conjugal slavery was not, according to the SCSL, a new crime, rather it included two different types of enslavement, sexual and non-sexual acts both of which fell within the CAH of enslavement.³² Conjugal slavery, according to the Pre-Trial Chamber, was a distinct form of sexual slavery.³³ The Trial Chamber of the SCSL in *Taylor* explained the earlier prosecutions at the SCSL of forced marriage as an ‘*other inhumane act*’ as ‘*it was charged in this manner, the Trial Chamber was required to review the charge in this manner*’.³⁴ The Trial Chamber in *Taylor* could not consider forced marriage as a CAH of an ‘*other inhumane act*’ as it was not prosecuted as the CAH of sexual slavery.

c. Defining forced marriage at the ICC

Although later in time, the decision in *Taylor* (2012) to prosecute forced marriage as CAH of sexual slavery is in keeping with the first reference to forced marriage at the ICC at the *Katanga* (2008) confirmation of charges hearing.³⁵ The ICC in *Katanga* acknowledged a link between

²⁵ Article 2 (i) of the Statute of the SCSL lists the CAH of an ‘*other inhumane act*’; Oosterveld, *Gender and the Charles Taylor Case at SCSL*, 2012 (n 14), 15

²⁶ *Taylor* (n 8)

²⁷ Oosterveld, *Gender and the Charles Taylor Case at SCSL*, 2012 (n 14), 20

²⁸ *Taylor* (n 8) [422] [1101] [1700]

²⁹ *Taylor* (n 8) [424]-[426]; Oosterveld, *Gender and the Charles Taylor Case at SCSL*, 2012 (n 14), 20

³⁰ *ibid*

³¹ Oosterveld, *Gender and the Charles Taylor Case at SCSL*, 2012 (n 14), 20; *Taylor* (n 8) [424]

³² *Taylor* (n 8) [424]; Oosterveld, *Gender and the Charles Taylor Case at SCSL*, 2012 (n 14), 20

³³ *Taylor* (n 8) [429]

³⁴ *Taylor* (n 8) [424]

³⁵ *Prosecutor v Katanga et al* (ICC-01/04-01/07), Decision on the confirmation of charges, 30 September 2008 [430]-[431] (*Katanga*)

enslavement, sexual slavery and forced marriage. Although forced marriage was not prosecuted by the ICC in *Katanga*, the opening statement of the Prosecutor in *Katanga* stated that women were ‘forced into marriage as combatants’ “wives” or detained to serve as sexual slaves by *Katanga* or *Ngudjolo*’s soldiers. All these women were victimized on the basis of their gender: they were attacked in particular because they were women’.³⁶ It would be some years later before forced marriage would be prosecuted before the ICC in *Ongwen* (2016).³⁷

The confirmation of charges hearing in *Ongwen*, acknowledged that forced marriage was not ‘explicitly’ included within the ‘jurisdiction’ of the Rome Statute.³⁸ The question the court had to answer was whether the conduct amounts to an ‘other inhumane act’ similar to the other CAH listed at Article 7 (1) (a)-(j) of the Rome Statute and causing great harm and/or suffering. The conduct in question, according to the Pre-Trial Chamber was whether *Ongwen*: ‘forced women to serve as “conjugal partners” to himself and other LRA fighters in the Sinia brigade’?³⁹ The Defence argued that forced marriage was subsumed by the CAH of sexual slavery as the Pre-Trial Chamber in *Katanga* held that sexual slavery included both forced labour and forced marriage.⁴⁰ Moreover, the Defence submitted that the prosecution was engaging in a ‘legal folklore’ as the materially distinct elements they were relying upon for forced marriage as an ‘other inhumane act’ were, according to them, the same as the materially distinct elements of sexual slavery.⁴¹

Ongwen relied upon the earlier jurisprudence of the SCSL in the *AFRC* and *RUF* cases with respect to the prosecution of forced marriage as an ‘other inhumane act’, citing ‘very similar factual allegations to those brought by the Prosecutor in’ *Ongwen*.⁴² The court also cited jurisprudence from the ECCC which recognised forced marriage as an ‘other inhumane act’, where victims were forced into ‘conjugal relationships’ and suffered harm as a result.⁴³ The Pre-Trial Chamber in the confirmation of charges case in *Ongwen* ignoring the most recent judgment of the SCSL on forced marriage in *Taylor*.

³⁶ *Ongwen*, (n 8) [91]

³⁷ *Ongwen* (n 8)

³⁸ *Ongwen* (n 8) [87]

³⁹ *Ongwen* (n 8) [88]

⁴⁰ *Prosecutor v. Dominic Ongwen*; ICC-02/04-01/15 [78] Public with Public Annexes A-C Further Redacted Version of “Defence Brief for the Confirmation of Charges Hearing”, filed on 18 January 2016; (Hereafter *Ongwen* Defence Brief for the Confirmation of Charges Hearing)

⁴¹ *ibid*, *Ongwen* (n 8) [87]

⁴² *Ongwen* (n 8) [89]

⁴³ *Ongwen* (n 8) [90]

The ICC Pre-Trial Chamber confirmed the charge of forced marriage as a CAH of an ‘*other inhumane act*’ as ‘*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) 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 rather than being subsumed by the crime of sexual slavery*’.⁴⁴ The court acknowledged that forced marriage will ‘*generally*’, take place in situations where a victim is ‘*sexually or otherwise enslaved*’;⁴⁵ highlighting the relationship between forced marriage and enslavement. The Pre-Trial Chamber went on to list certain circumstances which would suggest forced marriage, namely: ‘*restrictions on the freedom of movement, repeated sexual abuse, forced pregnancy, or forced labour, in particular the forced performance of domestic duties*’.⁴⁶ This list, for the most part, refers to crimes which are listed elsewhere within Article 7 (1) of the Rome Statute. The CAH of forced marriage as an ‘*other inhumane act*’, is distinguished from the other CAH under Article 7 (1) by the type of harm done to the victim. The harm associated with forced marriage as a CAH of an ‘*other inhumane act*’ would not necessarily fall within the same type of harm associated with other CAH listed under Article 7 (1) of the Rome Statute.⁴⁷ The ICC Prosecutor, Fatou Bensouda, in her opening statement in *Ongwen*, acknowledged the ‘*institutionalised*’ nature of forced marriage in that case.⁴⁸ Bensouda also spoke of the young nature of the girls and the punishment and harm they suffered, including the physical and mental harm suffered and the stigma with being associated with being a ‘*wife*’.⁴⁹ Harms which, according to the Pre-Trial Chamber did not fall under another CAH listed under Article 7 (1).

The ICC in *Ongwen* identified three elements in the CAH of forced marriage as an ‘*other inhumane act*’. First, the ‘*imposition of “marriage” on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage, as well as of a social status of the perpetrator’s “wife”*’.⁵⁰ The court stated that it is irrelevant that the marriage is legal or recognised by the State.⁵¹ The relevant factor is that a status of marriage is in fact

⁴⁴ *Ongwen* (n 8) [91]

⁴⁵ Ibid

⁴⁶ *Ongwen* (n 8) [92]

⁴⁷ Ibid

⁴⁸ *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen*, 6th December 2016 available at <https://www.icc-cpi.int/Pages/item.aspx?name=2016-12-06-otp-stat-ongwen> (Statement of Fatou Bensouda at the opening of Trial in the case against Dominic Ongwen, 2016)

⁴⁹ Ibid

⁵⁰ *Ongwen* (n 8) [92]

⁵¹ Ibid

placed on the victim, which results in ‘*social stigma*’.⁵² In other words, a victim does not consent to the ‘*marriage*’ and he/she suffers social stigma as a result of being ‘*married*’, albeit not legally, to the perpetrator.

The second element is ‘*exclusivity of this forced conjugal relationship*’ which is placed on the victim. The Pre-Trial Chamber held that *Ongwen* had not been charged with any other crime which (according to the Pre-Trial Chamber) included the element of exclusivity. Forced marriage therefore could not fall under an existing CAH under Article 7 (1) of the Rome Statute. The difficulty with this is that exclusivity can form a relevant factor in the CAH of enslavement or sexual slavery.⁵³

Thirdly, the Pre-Trial Chamber, clearly distinguished forced marriage from the crime of sexual slavery on the basis that forced marriage had the additional harm that it violated the ‘*basic right to consensually marry and establish a family*’ as enshrined in international conventions such as the ICCPR, UNHCR and CEDAW (discussed below).⁵⁴

Ongwen’s defence team sought leave to appeal the confirmation of charges hearings decision. The defence submitted, among other things, that the ICC Pre-Trial Chamber should have followed its earlier decision in *Katanga* which subsumed forced marriage into the CAH of sexual slavery.⁵⁵ Their application relied upon the principle of legality submitting that the Pre-Trial Chamber ‘*created a new element for a non-existent crime*’ and ‘*this finding is beyond the purview of the confirmation hearing and judicial activism in these circumstances impinge on Mr Ongwen’s rights to a fair trial since he is being charged with crimes that are not even enshrined in the Statute*’.⁵⁶ In response, the Trial Chamber first dealt with the suggestion that the Pre-Trial Chamber had engaged in ‘*judicial activism*’ when confirming the CAH of forced marriage as an ‘*other inhumane act*’, a crime which the defence suggested was not in the Rome Statute.⁵⁷ The Trial Chamber disagreed, indicating that the CAH of an ‘*other inhumane act*’ is listed under Article 7 (1) (k) of the Rome Statute and conduct, not listed elsewhere, could fall

⁵² *Ongwen* (n 8) [91]

⁵³ *Prosecutor v. Kunarac et al.*, Case No. IT-96-23T & IT-96-23/1-T, Judgment, (Feb. 22, 2001) 543 (Kunarac) Gershowitz, A ‘New’ Crime Against Humanity, 2009 (n 9)

⁵⁴ *Ibid*

⁵⁵ *Prosecutor v. Ongwen Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision ICC-02/04-01/15*, 29th March 2016 (Hereafter *Ongwen Defence Request for Leave to Appeal*)

⁵⁶ *Ibid*, *Ongwen Defence Request for Leave to Appeal* [42]

⁵⁷ *Prosecutor v. Ongwen Decision on the Defence request for leave to appeal the decision on the confirmation of charges ICC-02/04-01/15*, 29 March 2016 [37] (*Ongwen Decision on the Defence Request for Leave to Appeal*) [33]-[39]

under that offence once it satisfies the elements of the CAH of an ‘*other inhumane act*’.⁵⁸ Secondly, the Trial Chamber indicated that the defence was ‘*incorrect*’ in their assertion that the definition of forced marriage was already considered by the Pre-Trial Chamber in *Katanga*.⁵⁹ The Pre Trial Chamber concluded that the Pre-Trial Chamber in *Katanga* ‘*was not confronted with the question of whether “forced marriage” could qualify as an “other inhumane act” under Article 7 (as the crime was not even charged) or whether this conduct would be subsumed by sexual slavery.*’⁶⁰ The court went onto state that the Pre Trial Chamber in *Katanga* ‘*merely described, as a matter of fact and not as a matter of law, that the crime of sexual slavery “also encompasses situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labour involving compulsory sexual activity including rape, by their captors”.*’⁶¹ Thirdly, the court stated that that the prosecution of sexual slavery under Article 7 (1) (g) does not preclude forced marriage being prosecuted as an ‘*other inhumane act*’ under Article 7 (1) (k) of the Rome Statute.⁶² The Defence can raise the issue with the Trial Chamber as to whether forced marriage as a CAH of an ‘*other inhumane act*’ is subsumed by the CAH of sexual slavery.⁶³ Moreover, any error in the legal characterisation of forced marriage and its possible subsuming into the crime of sexual slavery would not impact on the fair trial rights of the accused in the confirming of those charges.⁶⁴

The definition and legal characterisation of forced marriage at the ICC may not definitive, as the court is not required to follow its own judgments.⁶⁵ The language used in *Ongwen* that forced marriage, ‘*may, in the abstract*’ amount to an ‘*other inhumane act*’ also suggests that it could amount to a different CAH listed under Article 7 (1) of the Rome Statute.⁶⁶ The author is limited when comparing the decisions of *Katanga* and *Ongwen* as the facts before each are different. Forced marriage as a CAH of an ‘*other inhumane act*’ was not before *Katanga* and forced marriage as the CAH of sexual slavery was not before the court in *Ongwen*. The factual situations which gives rise to the crime of forced marriage can vary, thus resulting in a different legal characterisation depending on the circumstances.

⁵⁸ Ibid, [36]

⁵⁹ *Ongwen* Decision on the Defence Request for Leave to Appeal (n 57) [37]

⁶⁰ Ibid

⁶¹ *Ongwen* Decision on the Defence Request for Leave to Appeal (n 57) [37]

⁶² *Ongwen* Decision on the Defence Request for Leave to Appeal (n 57) [38]

⁶³ Ibid

⁶⁴ *Ongwen* Decision on the Defence Request for Leave to Appeal (n 57) [38]

⁶⁵ Rome Statute, Article 21 (2) Note reference to the word ‘may’.

⁶⁶ *Ongwen*, (n 8) [91]

II: Relevant international conventions available to the ICC Preparatory Commission

Oosterveld identifies some common factors between the forced marriages in different jurisdictions.⁶⁷ Some of these factors are also present at the ICC in *Ongwen*. They are relevant in trying to identify common elements in the CAH of forced marriage as an ‘*other inhumane act*’ as opposed to the CAH of sexual slavery and/or enslavement.

- The marriage was ‘*institutionalised*’
- Failure to marry would result in serious injury or death
- Young people were the targets of the forced marriages
- The individuals did not know each other
- There was no consent
- Forced marriages sometimes happened in groups
- There were no rituals⁶⁸

These common factors should be borne in mind when considering the status of forced marriage in ICL at the time of the Preparatory Commission.

This thesis does not focus on arranged marriages or peace time forced marriages. They are not prosecutable before the ICC as they would not satisfy the elements of a CAH under Article 7 (1) of the Rome Statute. These Conventions are therefore relevant solely with respect to whether there was any consensus as to whether the act of forced marriage was prohibited and whether it amounted to or fell within a CAH listed under Article 7 (1) of the Rome Statute.

a. Marriage requires free and full consent

Free and full consent is prerequisite for a marriage to be legal in ICL. In 1948 the Universal Declaration on Human Rights (UDHR) was adopted by the UN General Assembly. Article 16 (2) of the UDHR states that “[m]arriage shall be entered into only with the free and full consent of the intending spouses”. In 1966 this provision was included in the International Covenant

⁶⁷Oosterveld, *Forced Marriage During Conflict and Mass Atrocity* in the Oxford Handbook of Gender Conflict (n 9), 248; The situation in Cambodia is worth considering in brief as the ECCC has prosecuted forced marriage as a CAH. Criticisms of the ECCC and limitations with respect to the word count of this thesis have caused the author not to consider it in any detail.

⁶⁸Ibid

on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESR) and in 1979 by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁶⁹ Consent of both parties is key for marriage to comply with human rights instruments. Lack of consent also falls within Oosterveld's list as a common factor present in forced marriage.

A link between marriage as referenced in the conventions and forced marriage has been substantiated by Pre-Trial Chamber in *Ongwen*. Prosecution submissions made to the Pre-Trial Chamber in *Ongwen* highlighted that forced marriage is separate and distinct from the CAH of sexual slavery as it breaches a person's right to '*consensually marry and establish a family*' as enshrined by the ICCPR, UDHR, CEDAW.⁷⁰ As outlined in Part 1 of this Chapter, the Pre-Trial Chamber in *Ongwen* concurred with the prosecution and distinguished forced marriage from the crime of sexual slavery on the basis that forced marriage had additional harm as it '*violates the independently recognised basic right to consensually marry and establish a family*.'⁷¹

The importance of consent in the context of marriage was also emphasised at the SCSL in the *RUF* Trial Judgment. The SCSL in considering forced marriage found that where coercive conditions existed there should be a '*presumption of absence of genuine consent to having sexual relations or contracting marriages with the said RUF fighters*'.⁷² However, this must be contrasted with the judgment of the Trial Chamber in *Taylor* where the court stated that '*[t]he primary characteristic of enslavement is the absence of the consent or free will of the victim*.'⁷³

A reference to lack of consent in forced marriage is not necessarily indicative of how forced marriage might be legally characterised i.e. as enslavement or an '*other inhumane act*'. What is important is that the lack of consent, as outlined by the ICCPR, UDHR or CEDAW suggests that forced marriage is illegal, regardless of how it might be legally characterised. The Preparatory Commission of the ICC had access to these international instruments in negotiating

⁶⁹ Article 23 (3) International Covenant on Civil and Political Rights, United Nations High Commissioner for Human Rights, 23 March 1976; Article 10 (1) International Covenant on Economic, Social and Cultural Rights, 3 January 1976; Article 16 (1) (b) Convention on the Elimination of All Forms of Discrimination Against Women, UN Division for Advancement of Women, 18 December 1979

⁷⁰ *Ongwen* (n 8) [94]

⁷¹ *Ibid*

⁷² *RUF* Trial Judgement (n 8) [1471] [1293]

⁷³ *Taylor* (n 8) [420]

the crimes which should be included in the Rome Statute and could have considered consent, or the lack of it, in the context of forced marriage. (See Part III below)

b. Servile/forced marriage and the Slavery Conventions

The *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956* [the 1956 Supplementary Convention]⁷⁴ extended the 1926 Slavery Convention to include four acts of servitude:⁷⁵ debt bondage⁷⁶; serfdom⁷⁷; servile marriage⁷⁸ and child exploitation⁷⁹ ‘*where they still exist and whether or not they are covered by the definition of slavery*’.⁸⁰ Servile marriage, according to that Convention, occurs where a woman is given in marriage without her consent for value or consideration. Article 2 of the 1956 Supplemental Convention also requires States parties to prescribe appropriate minimum ages of marriages and to facilitate the free consent of both parties entering marriage, a reference no doubt to the UDHR.

The definition of slavery has changed very little since the implementation of the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 [the 1926 Slavery Convention].⁸¹ Article 1 (1) of the 1926 Slavery Convention defines slavery as ‘*the*

⁷⁴ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956; 266 UNTS 3/ 1958 ATS 3 [The 1956 Supplementary Convention]

⁷⁵ Jean Allain, *The Legal Understanding of Slavery from the Historical to the Contemporary* (Oxford University Press, 27 Sep 2012) 207; Allain notes that the definition of slavery was interpreted broadly, beyond that which was originally intended to include, for example, ‘*apartheid, colonialism and incest, under the guise of slavery*’.

a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

⁷⁶ 1956 Supplementary Convention, Article 1 (a) (n 74)

⁷⁷ 1956 Supplementary Convention, Article 1 (b) (n 74)

⁷⁸ 1956 Supplementary Convention, Article 1 (c) (n 74)

⁷⁹ 1956 Supplementary Convention, Article 1 (d) (n 74)

⁸⁰ 1956 Supplementary Convention, Article 1 (n 74); Note that the League of Nations in 1936 published Slavery: Report of the Advisory Committee of Experts, Third (Extraordinary) Meeting of the Advisory Committee, C.189(I). M.145.1936, VI, 13-14 April 1936, p. 27; There they stated that: - “*It is important, however, to keep the fundamental distinction clearly in mind, and to realise that the status of ‘serfdom’ is a condition ‘analogous to slavery’ rather than a condition of actual slavery, and that the question whether it amounts to ‘slavery’ within the definition of the Slavery Convention must depend upon the facts connected with each of the various systems of ‘serfdom’*”. However, the inclusion of serfdom within the Supplemental Convention arguably blurs the lines between the two.

⁸¹ *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926*, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 ‘The Convention was amended by the Protocol done at the Headquarters of the United Nations, New York, on 7 December 1953; the amended Convention entered into force on 7 July 1955, the date on which the amendments, set forth in the annex to the Protocol of 7 December 1953, entered into force in accordance with article III of the Protocol’ available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx> (The Slavery Convention, 1926)

*status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.*⁸²

Servile marriage, according to the Supplementary Convention 1956, is ‘*similar to slavery*’.⁸³ Bunting et al comment that forced marriage is ‘*broader in scope*’ than servile marriage.⁸⁴ However, the UN Office on Drugs and Crime (UNODC), in a guidance document on ‘*Model Law on Trafficking in Persons*’, interprets the Supplementary Convention as including both ‘*forced or servile marriages*’.⁸⁵ UNODC proceeds to define both forced and servile marriage in terms of Article 1 (c) of the Supplementary Convention namely, where a woman ‘*is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group*’.⁸⁶ Also prohibited is a right of transfer of a wife for value or otherwise and on the death of the husband. The use of the word ‘*practice*’, suggests that there is no necessity for a legal marriage to take place for ‘*servile marriage*’ to occur. The UNODC guidance document, although, dated after the implementation of the Rome Statute, is relevant given that it interprets the Supplemental Convention 1956; a document available to the Preparatory Commission.

The author believes that servile marriage is the precursor to ‘*forced marriage*’, as defined by the SCSL and ICC. However, there are some differences between what international instruments, such as the Slavery Convention and CEDAW intended to cover (arguably consent with respect to legal marriage)⁸⁷ and their application to the taking of a ‘*wife*’ in a conflict zone, where there is no legal standing for marriage.

Arguably, the strict view of ‘*ownership*’ has evolved to include ‘*various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership.*’⁸⁸ This arguably permits servile marriage, or other types of marriage, such as forced marriage, to be prosecuted as a CAH if it satisfies the elements of the crime of

⁸² Ibid, *The Slavery Convention*, 1926, Article 1

⁸³ *The Slavery Convention*, 1926, Article 1 (n 81) Section I. - Institutions and practices similar to slavery

⁸⁴ Bunting, et al, *Marriage by Force*, 2016: Introduction (n 9)

⁸⁵ *Model Law against Trafficking in Persons United Nations*, United Nations Office on Drugs and Crime (2009) 16 available at https://www.un.org/ruleoflaw/files/UNODC_Model_Law_on_Trafficking_in_Persons.pdf (UNODC Model Law against Trafficking in Persons)

⁸⁶ Ibid

⁸⁷ 1956 *The Slavery Convention*, Article 1 (c), Article 2 (n 74); UNODC Model Law against Trafficking in Persons (n 85)

⁸⁸ *Kunarac et al.* (IT-96-23 & IT-96-23/1-A) Judgment, 12 June 2002, [118] (Hereafter Kunarac Appeal Judgment)

enslavement if ‘*there were powers attaching to the rights of ownership*’ or, a ‘*similar deprivation of a person’s liberty*’.⁸⁹

Key to the definition of forced marriage as the CAH of enslavement is the interpretation of ‘*powers attaching to the rights of ownership*.’ This was not defined by the Slavery Convention but is considered in the 1953 Report of the Secretary-General.⁹⁰ The 1953 Report held that the *travaux préparatoires* of the Slavery Convention did not provide any precise indication of what was meant by the term.⁹¹ It concluded that it could reasonably be assumed that the concept of ownership referred to ‘*the authority of the master over the slave in Roman law*’ and was therefore ‘*comparable to the rights of ownership, which included the right to acquire, to use, or to dispose of a thing or of an animal or of its fruits or offspring*’.⁹²

Allain, via an assessment of the *travaux préparatoires* of both the 1926 Slavery Convention and the 1956 Supplementary Convention comments that the powers attaching to the rights of ownership are the ‘*purchase; transfer; absolute control over a person, their labour and the product of that labour; and that the end of the status of conditions was indeterminate for the enslaved; while the status or condition could be hereditary*.’⁹³ Certainly this is in keeping with the comments of the ICTY Trial Chamber in *Kunarac* such that exclusivity is a relevant factor in the CAH of enslavement.⁹⁴ It also reflects the more recent prosecution of forced marriage as enslavement at the SCSL in *Taylor*.⁹⁵ The Trial Chamber in *Taylor* stated that the term forced marriage is a ‘*misnomer*’ for ‘*forced conjugal association*’ and it is best described as ‘*conjugal slavery*’.⁹⁶ Conjugal Slavery, according to the SCSL, is a distinct form of sexual slavery.⁹⁷

⁸⁹ Bunting et al, *Marriage by Force*, 2016: Introduction (n 9)

⁹⁰ *United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude* (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953, 40

⁹¹ Jean Allain; *The Slavery Conventions - The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Brill, 2008) (Allain, *The Slavery Conventions*, 2008); See also *United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude* (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953, 40

⁹² *Ibid*

⁹³ *United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude* (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953, cited by Jean Allain, *International Criminal Law and Anti-Slavery Today*, Queen’s University of Belfast Symposium on Closing the Slave Trade (2008) available at <http://www.yale.edu/glc/queens/abstracts/allain.pdf>

⁹⁴ *Prosecutor v. Kunarac et al.*, Case No. IT-96-23T & IT-96-23/1-T, Judgment, (Feb. 22, 2001) (n 53) [543] Gershowitz, A ‘*New*’ Crime Against Humanity, 2009 (n 9)

⁹⁵ *Taylor* (n 8)

⁹⁶ *Taylor* (n 8) [425]

⁹⁷ *Taylor* (n 8) [429]. See para 420 for the courts consideration on the facts which determine whether the accused exercised a power attaching to the rights of ownership over a victim.

The Preparatory Commission of the ICC had access to the Slavery Conventions when drafting the Rome Statute and the Elements of Crimes. It would certainly appear (discussed below) that there was documentation before the Preparatory Commission of the ICC that suggested that forced marriage fell within the CAH of enslavement and/or sexual slavery.⁹⁸ Defining forced marriage in these terms is supported by the SCSL decision in *Taylor*.

c. *De Facto* Marriages: UN Convention on the Elimination of all Forms of Discrimination Against Women

While the Supplemental Convention was a key international instrument available to the Preparatory Commission, it was followed, by CEDAW, which provided for the right to ‘freely’ consent and ‘choose a spouse’.⁹⁹ CEDAW placed an obligation on States Parties to ‘eliminate discrimination’ relating to marriage and family relationships to ensure that women and men would be treated equally.¹⁰⁰ It also prohibited child betrothal and marriage and required States Parties to have a minimum age for marriage.¹⁰¹ CEDAW was shortly followed by the signature and ratification of the Convention on Consent to Marriage, Minimum Age for Marriage.¹⁰²

Freeman notes that CEDAW does not define ‘marriage’, ‘family relationships’ or ‘family relations’.¹⁰³ Difficulties may arise with ‘unregistered marriages or *de facto* unions’, whereby the individuals and/or the wider community view two people as married but the State does not.¹⁰⁴ In the authors view, *de facto* unions or relationships, may fall within a category of non-legal marriages. Most circumstances surrounding forced marriage do not result in a legal marriage. If a *de facto* union or forced marriage is viewed as a ‘marriage’, within the eyes of the individuals involved and/or community then forced marriage should fall within CEDAW

⁹⁸ *Women’s Caucus for Gender Justice*, Dec 1997 (n 6) WC.4.3 & 4.4; Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int’l L. 605 (2004), 624

⁹⁹ Article 16 UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13 (Hereafter CEDAW)

¹⁰⁰ *Ibid*, CEDAW, Article 16 (1)

¹⁰¹ CEDAW, Article 16 (2) (n 99)

¹⁰² *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* Opened for signature and ratification by General Assembly resolution 1763 A (XVII) of 7 November 1962 Entry into force: 9 December 1964, in accordance with article 6

¹⁰³ Freeman, Marsha and Chinkin, Christine and Rudolf, Beate, *The UN Convention on the Elimination of All Forms of Discrimination against Women: a commentary*. Oxford commentaries on international law (Oxford University Press 2012) 416 (Freeman et al, *The UN Convention on the Elimination of All Forms of Discrimination against Women*, 2012)

¹⁰⁴ *Ibid*, 418

regardless of the legal status of that marriage.¹⁰⁵ This is relevant given that CEDAW was available to the negotiators and the drafters of the Rome Statute and the Elements of Crimes.

d. The Cape Town Principles: The relationship between forced marriage and child soldiers

In 1997, in advance of the Preparatory Commission for the ICC, the Cape Town Principles, defined child soldiers as including ‘*girls recruited for sexual purposes and forced marriage*’.¹⁰⁶ This was the first time that the definition of child soldiers included children who were used for forced marriage or sexual reasons.¹⁰⁷ The Cape Town Principles required states parties to implement national law prohibiting the use of child soldiers, including their use for forced marriage.¹⁰⁸ Moreover, Article 5 of the Cape Town Principles states that ‘*a permanent International Criminal Court should be established whose jurisdiction would cover, inter alia, the illegal recruitment of children*’.

The Cape Town Principles suggest that the prosecution of the illegal recruitment of children, at the ICC, would, according to the definition of child soldier, include situations involving sexual slavery and forced marriage. In 1997 the war in Sierra Leone had commenced and at that time, child soldiers were being used and were subject to sexual slavery and forced marriage.¹⁰⁹ (The relevance of this will be discussed in further detail below when considering *Lubanga*)

In advance of, and during, the process of drafting the Rome Statute and the Elements of Crimes, the Preparatory Commissions had access to international instruments, mentioned above, and international reports, discussed below, which linked forced marriage to enslavement, sexual slavery and the recruitment of child soldiers. However, at that time forced marriage had never been prosecuted by an international tribunal, let alone defined in international criminal law.

¹⁰⁵ Freeman et al, *The UN Convention on the Elimination of All Forms of Discrimination against Women*, 2012 (n 103) 418.

¹⁰⁶ *Cape Town Principles and Best Practice on the Prevention of Recruitment of Children into the Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa* (Hereafter Cape Town Principles)

¹⁰⁷ Joe Tan, *Sexual Violence Against Children on the Battlefield as a Crime of Using Child Soldiers: Square Pegs in Round Holes and Missing Opportunities in Lubanga*, Yearbook of International Humanitarian Law, Volume 15; Volume 2012, 117 at 133

¹⁰⁸ Cape Town Principles, Article 3, (n 106)

¹⁰⁹ Human Rights Watch, “*WE’LL KILL YOU IF YOU CRY*” *Sexual Violence in the Sierra Leone Conflict*, January 2002, Vol. 15, No. 1 (A) available at <https://www.hrw.org/sites/default/files/reports/sierleon0103.pdf> (Last accessed 23rd November 2017)

The next part considers whether the drafters of the Rome Statute and the Elements of Crimes of the ICC, missed an opportunity to include forced marriage within the jurisdiction of the court or whether they believed it was included in another CAH listed under Article 7 (1) of the Rome Statute.

III: Defining forced marriage at the ICC: missed opportunities

a. Missed opportunity: Evidence of forced marriage available to the Preparatory Commission of the ICC

Forced marriage was referenced in submissions to the Preparatory Commission for the ICC on the definition of the CAH of enslavement and sexual slavery.¹¹⁰ At that time there had never been an international prosecution for forced marriage as a CAH. The reference to forced marriage in some documentation for the Preparatory Commission indicates that some states, at least, considered that forced marriage fell under the CAH of enslavement and/or sexual slavery.

¹¹¹ This is in keeping with the use of the term ‘*servile marriage*’ in the 1956 Supplementary Convention.¹¹²

In December 1997, the Women’s Caucus for Gender Justice (WCGJ) provided recommendations to the Preparatory Commission.¹¹³ Their submission made several references to forced marriage, which had both a sexual and non-sexual element and therefore could fall within the definition of enslavement and/or sexual slavery. Speaking about gender discrimination the WCGJ said:

*“Gender violence also includes non-sexual attacks on women or on men based on their gender-defined roles; the physical or psychological targeting of women or their livelihoods to undermine the civilian population during war; attacks on reproductive integrity such as forced pregnancy or forced sterilization; **the enslavement of women through forced marriage or otherwise for domestic as well as sexual service**; and*

¹¹⁰ Women’s Caucus for Gender Justice, Dec 1997 (n 6) Part III: War Crimes, Recommendation 7

¹¹¹ Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates concerning the elements of crimes against humanity, 3rd December 1999 PCNICC/1999/WGEC/DP.39 available at <https://www.legal-tools.org/doc/33d070/pdf/> last accessed 6th November 2017

¹¹² 1956 Supplementary Convention, Article 1 (a) (n 74)

¹¹³ Women’s Caucus for Gender Justice, Dec 1997 (n 6) Part III: War Crimes, Recommendation 7

intentional or negligent disregard for the consequences of warfare on women--e.g. the impacts of chemical warfare."¹¹⁴[Emphasis added]

They also called for codification of '*recent progressive developments*' and the inclusion of sexual and GBV as crimes where the facts satisfy the elements of those crimes.¹¹⁵ Referring to the situation in '*Rwanda, Algeria and other parts of the world, the practice of taking women as "temporary wives" or in forced "temporary marriage" is also sexual enslavement*',¹¹⁶ therein linking it to the current crime of sexual slavery rather than enslavement.¹¹⁷ Referencing the non-sexual aspects of forced marriage, the submissions to the Preparatory Commission emphasised that '*women are impressed into providing domestic services whether on a large-scale or individualized (forced temporary marriage) basis. The same is true when minors are impressed into military service...*'.¹¹⁸

This is a very clear statement that at the time of drafting the Rome Statute, the Preparatory Commission had evidence before it which indicated that forced marriage amounted to the CAH of enslavement and/or sexual slavery.

Oosterveld, a member of the Canadian delegation to the ICC negotiations, wrote some years later, in 2004, that the WCGJ submissions provide '*that women may be forced into maternity or "temporary" marriage complete with domestic duties, both of which might have sexual and non-sexual aspects. In this situation, a Prosecutor could charge both enslavement and sexual slavery*'.¹¹⁹ The recognition in December 1997 by the WCGJ of the sexual and non-sexual aspects to forced marriage would later be considered and accepted by the SCSL and the ICC. It would however take some years to gain momentum. The drafters of the Rome Statute had definitive evidence and information before it, which recognised forced marriage as falling within the CAH of enslavement and sexual slavery.

This argument is further advanced as in December 1999, two years later, the work of the WCGJ had arguably gathered some attention by the States parties. Some Arab States put forward a proposal to the Preparatory Commission of the ICC to limit the elements for the crime of enslavement and sexual slavery to exclude certain types of forced marriage. They submitted

¹¹⁴ Ibid; *Women's Caucus for Gender Justice*, Dec 1997 (n 6) W.C. 4.3

¹¹⁵ *Women's Caucus for Gender Justice*, Dec 1997 (n 6) W.C. 5.1

¹¹⁶ *Women's Caucus for Gender Justice*, Dec 1997 (n 6) WC.5.6-7

¹¹⁷ *Women's Caucus for Gender Justice*, Dec 1997 (n 6) WC.5.6-13

¹¹⁸ *Women's Caucus for Gender Justice*, Dec 1997 (n 6) WC.5.6-13

¹¹⁹ *Women's Caucus for Gender Justice*, Dec 1997 (n 6) WC.4.4; Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int'l L. 605 (2004), 624

that the '[p]owers attaching to ownership do not include rights, duties and obligations incident to marriage between a man and a woman'.¹²⁰ This proposal was criticised by the WCGJ, which cited its incompatibility with Article 21 (3) of the Rome Statute, namely it did not comply with 'internationally recognized human rights' as it discriminated on the grounds of gender. It also, according to the WCGJ, contravened the UDHR the ICCPR, the ICESCR and CEDAW. The WCGJ also made submissions linking forced marriage to enslavement to the Preparatory Commission for the ICC.¹²¹ They criticised the elements of crime of enslavement and sexual slavery as they were at that time as they 'unduly limit the crime by listing illustrative acts of a commercial nature which do not encompass most of the crimes involved in trafficking or the slave trade, such as deceiving, coercing, harboring, transporting, etc. Moreover, it threatens to exclude slavery-like conditions such as debt bondage, forced marriage and child labor which do not require purchase or sale, etc'.¹²²

The submissions were dated December 1997 and March 2000 and at that time forced marriage was starting to gain momentum on the international agenda.¹²³ In July 1999, Human Rights Watch (HRW) published a report into the actions of the RUF in Sierra Leone. HRW outlined the abduction of young women and girls who were taken as 'wives' or sexual partners for male combatants'.¹²⁴ The report did not specifically refer to forced marriage, although, the testimony reported reflects some of the components which the SCSL subsequently prosecuted as forced marriage. A HRW Report based on interviews conducted in May 1999 illustrated the prevalence of the taking of women and girls as 'bush wives'.¹²⁵

¹²⁰ Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates concerning the elements of crimes against humanity, 3rd December 1999 PCNICC/1999/WGEC/DP.39 available at <https://www.legal-tools.org/doc/33d070/pdf/> last accessed 6th November 2017

¹²¹ Women's Caucus for Gender Justice Submission to the Preparatory Commission, March 13, 2000 (n 6)

¹²² Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui ICC-01/04-01/07 Opening Statement, The Hague, 24 November 2009 Available at <https://www.icc-cpi.int/NR/rdonlyres/D8F34FB0-DEAD-431A-8F80-54757F418EAC/281274/091124KatangaOpeningStatementformatted1.pdf> (Katanga Opening Statement)

¹²³ United States Department of State, U.S. Department of State Country Report on Human Rights Practices 1999 - Ethiopia, 25 February 2000

¹²⁴ Human Rights Watch; Sierra Leone: Getting Away with Murder, Mutilation, Rape - New Testimony from Sierra Leone July 1999, Vol.11 No 3(A) available at <https://www.hrw.org/reports/1999/sierra/> (last accessed 22nd November 2017)

¹²⁵ Human Rights Watch interviews, Freetown, May 4, May 8, and May 22, 1999 Referenced in Human Rights Watch Human Rights Abuses Committed By ECOMOG, Sierra Leonean Defence Forces and Police, Human Rights available at <https://www.hrw.org/reports/1999/sierra/SIERLE99-04.htm> last accessed 2nd July 2018

In June 2000, Amnesty International published a Report *Sierra Leone: Rape and Other forms of Sexual Violence against Girls and Women*.¹²⁶ The report begins with the story of a 16-year-old girl who states that she was ‘forced to become the “wife” of one of the rebels. Many other girls were held in the same situation.’¹²⁷ The first paragraph of the report defined ‘sexual slavery’ as including forced ‘marriage’:

‘Sexual slavery refers to situations where girls and women are forced into “marriage”, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors’.¹²⁸

Amnesty’s report throughout makes references to the women and girls being forced to be a “wife” of a single combatant’.¹²⁹ Language points to ‘exclusivity’ within the forced marriage on the part of the victim.¹³⁰ An element which would later be considered by the ICC in *Ongwen*. The events referred to in Amnesty’s report were from 1999, when the Preparatory Commission of the ICC was still in session.¹³¹ Yet records suggest that forced marriage was not considered in any detail by the Preparatory Commission.

The UN Mission in Sierra Leone visited the region in February 2000 reporting that women felt forced to marry their captors and to live as their wives, due to the social stigma.¹³² In October 2000, the Immigration and Refugee Board of Canada, cited Amnesty’s International Report.¹³³

The importance of the timing of this report and subsequent reports, such as those from Amnesty is as follows. At the time of negotiating the Rome Statute, all be it near the end of the term of

¹²⁶ Amnesty International, *Sierra Leone: Rape and Other forms of Sexual Violence against Girls and Women* 28 June 2000 AI Index: AFR 51/35/00 available at <file:///C:/Users/maria/Downloads/afr510352000en.pdf> (Amnesty International; *Sierra Leone: Rape and Other forms of Sexual Violence against Girls and Women*)

¹²⁷ Ibid, *Amnesty International, Sierra Leone: Rape and Other forms of Sexual Violence against Girls and Women*, 1

¹²⁸ Amnesty International, *Sierra Leone: Rape and Other forms of Sexual Violence against Girls and Women* (n 126) 1

¹²⁹ Amnesty International, *Sierra Leone: Rape and Other forms of Sexual Violence against Girls and Women* (n 126) 2/3

¹³⁰ ibid

¹³¹ Amnesty International, *Sierra Leone: Rape and Other forms of Sexual Violence against Girls and Women* (n 126) 2/3

¹³² Amnesty International, *Sierra Leone: Rape and Other forms of Sexual Violence against Girls and Women* (n 126) 4

¹³³ Canada: Immigration and Refugee Board of Canada, *Sierra Leone: Prevalence of forced marriage of widows to deceased (missing) husband's relatives, and of young girls in arranged marriages among the Fula; whether children of deceased (missing) father belong to his family; availability of state protection and internal flight alternatives*, 6 October 2000, SLE35429.E, available at <http://www.refworld.org/docid/3df4bea9c.html> (last accessed 22nd November 2017) (Canada: Immigration and Refugee Board of Canada, *Sierra Leone: Prevalence of forced marriage...* October 2000)

the Preparatory Commission, there was documented evidence (including from States Parties) which confirmed that forced marriage was taking place in armed conflict. These reports also illustrated that the taking of someone as a ‘wife’, was ‘*intentionally causing great suffering, or serious injury to body or to mental or physical health*’ of the victim;¹³⁴ the latter being an element of the CAH of an ‘*other inhumane act*’. This raises the question why records show that forced marriage was not considered in any detail by State Parties and whether the failure to include forced marriage within the Rome Statute illustrates that it was not a CAH in international law or rather that it was subsumed, most likely, into the CAH of enslavement and/or sexual slavery?

The Preparatory Committee considered the Elements of Crimes at a session in March 2000.¹³⁵ Around that time reports came out that women and girls were being subjected to GBV and forced marriage in Sierra Leone.¹³⁶ The Elements of Crimes were adopted by the UN General Assembly in September 2002 making no reference to forced marriage, or so it would appear.¹³⁷

Certainly, the negotiators of the Elements of Crimes had access to information that forced marriage was occurring in Sierra Leone. Testimonies of women spoke of the obligations placed on them as a ‘wife’ such as a relationship of exclusivity with the perpetrator, sexual violence, rape, forced labour, and deprivation of liberty.¹³⁸ In many respects the quotes, outlined above, from the victims satisfy in principle the elements of enslavement and/or sexual slavery under the Elements of Crime of the ICC.¹³⁹ Moreover, the footnote in the Element of Crimes of enslavement and sexual slavery clarifies what is meant by the term deprivation of liberty, providing that in certain circumstances forced labour or ‘*reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956*’ may fall within the term. The trafficking

¹³⁴ Rome Statute, Section 7 (1) (k) an element of the Crime against humanity of an ‘other inhumane act’.

¹³⁵ *Preparatory Commission for the International Criminal Court* (Fourth Session) 13 to 31 March 2000 Available at <http://legal.un.org/icc/prepcomm/prepmar.htm> last accessed 19th March 2018

¹³⁶ Canada: Immigration and Refugee Board of Canada, *Sierra Leone: Prevalence of forced marriage...* October 2000 (n 133) SLE35429.E; Amnesty International, *Sierra Leone: Rape and Other Forms of Sexual Violence Must be Stopped*, 30 June 2000

¹³⁷ *Report (Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court* (ICC-ASP/1/3 and Corr.1)(2002) 5 available at http://legal.un.org/icc/asp/1stsession/report/first_report_contents.htm last accessed 19th January 2018

¹³⁸ Ibid, Canada: Immigration and Refugee Board of Canada, *Sierra Leone: Prevalence of forced marriage.* October 2000 (n 133) SLE35429.E; Amnesty International. 30 June 2000. *Sierra Leone: Rape and Other Forms of Sexual Violence Must be Stopped*

¹³⁹ *ibid*

of women and children was also included within the meaning of deprivation of liberty. As referenced above, servile marriage formed part of the 1956 of the Slavery Convention of 1956.

According to Oosterveld it became clear during the December 1999 session of the Preparatory Commission that there were difficulties with the wording of a rolling text for enslavement for two reasons.¹⁴⁰ First, there was criticism that the list of instances where ownership could take place was too narrow. This was in keeping with the criticisms of the WCGJ.¹⁴¹ Secondly, there were fears that the term "*similar*" within the context of '*similar deprivation of liberty*', *could be read to mean "similar to actions with a commercial or pecuniary nature"*.¹⁴² This might have been interpreted to require a monetary aspect for the prosecution of sexual slavery and enslavement'.¹⁴³ A wording was favoured which could be interpreted widely within international law.¹⁴⁴ The solution was, a footnote put forward by Canada, which '*explained that the deprivation of liberty should take into account actions not listed but which are also major indicia of the exercise of ownership under international law*'.¹⁴⁵ The footnote to the elements of crime of enslavement and sexual slavery states:

*"It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children."*¹⁴⁶

Oosterveld observed that the importance of the inclusion of the footnote was twofold.¹⁴⁷ Trafficking was mentioned in the footnote; however, the only reference in the Rome Statute to trafficking was in the CAH of enslavement. A reference to trafficking in the footnote of sexual

¹⁴⁰ Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int'l L. 605 (2004), 631/632

¹⁴¹ Katanga Opening Statement (n 122)

¹⁴² Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int'l L. 605 (2004), 632

¹⁴³ Ibid

¹⁴⁴ Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int'l L. 605 (2004), 632

¹⁴⁵ Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int'l L. 605 (2004), 634

¹⁴⁶ ICC Elements of Crime, Crime against Humanity of Enslavement pg. 6, footnote 11. Crime against Humanity of Sexual Slavery Pg. 8, footnote 11

¹⁴⁷ Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int'l L. 605 (2004) 634

slavery therefore meant that it fell within the remit of the CAH of sexual slavery and enslavement. Secondly, the inclusion of forced labour and servile status in the definition of deprivation of liberty, is in keeping with the non-sexual aspect of forced marriage foresaw by the WCGJ.¹⁴⁸ Oosterveld references the provisions of Article 1 (c) and (d) of the Supplementary Slavery Convention of 1956, where a woman or child is given in marriage for value or otherwise (cited above).¹⁴⁹ These provisions apply even if there is no monetary value or a value in kind given in exchange for, for example, a marriage. A crime can therefore fall within the definition of enslavement or sexual slavery where there is no pecuniary interest, meaning that ownership can take place regardless of whether a payment has taken place.¹⁵⁰ The deprivation of liberty of a woman (or man) for the purposes of forced marriage, which would fall within the definition of the Slavery Convention of 1956, would fall within the elements of enslavement and sexual slavery. Bunting, Ferme and Hynd, are also of the view that forced marriage, in the context of ‘*bush wives*’ of Sierra Leone would fall within enslavement under Article 7 of the Rome Statute.¹⁵¹

It is important to be mindful that at the time of the drafting of the Rome Statute and the Elements of Crimes there was no definition of forced marriage in international law, other than that referenced in the Slavery Convention of 1956, if it could even be called that. It could be argued that the testimonies of the victims of forced marriage, which was available to the Preparatory Commission was considered by the inclusion of the footnote to enslavement in the Elements of Crimes of the ICC. It is also in keeping with the submission of the WCGJ, which were concerned with limiting the CAH of enslavement and sexual slavery as the text failed to include ‘*slavery-like conditions such as debt bondage, forced marriage and child labor which do not require purchase or sale, etc*’.¹⁵²

Notwithstanding references to forced marriage throughout the work of the Preparatory Commission, it is very disappointing that there was no explicit reference in either the Rome Statute or the Elements of Crimes to forced marriage. This does not necessarily prevent the court from prosecuting forced marriage under Article 7 (1) Rome Statute. Quite the contrary;

¹⁴⁸ *ibid*

¹⁴⁹ Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int'l L. 605 (2004), 634

¹⁵⁰ Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int'l L. 605 (2004), 635

¹⁵¹ Bunting et al, *Marriage by Force*, 2016: Introduction (n 9)

¹⁵² Katanga Opening Statement (n 122)

given all the information before the Preparatory Commission, there was a clear view, by some, that forced marriage fell within the CAH of enslavement and sexual slavery.

The link between forced marriage and the CAH of sexual violence was considered in 2001 by the International Criminal Tribunal for the former Yugoslavia (ICTY). The decision in *Kvočka*, found that sexual violence can include forced marriage:

*‘sexual violence would also include such crimes as sexual mutilation, forced marriage and forced abortion as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization” and other similar forms of violence.’*¹⁵³

However, the reference to forced marriage in *Kvočka* was arguably a step back, as the WCGJ, had four years earlier argued that the crime of forced marriage had both sexual and non-sexual aspects. The sexual aspect of forced marriage was the sole focus in *Kvočka*. This therefore did not take account of the full harm suffered by the victims. Moreover, it appears that there was still no consensus as to the definition of forced marriage and the question still arose as to whether it was solely a crime of a sexual nature or had it non-sexual aspects, which resulted in domestic labour.

The relationship between GBV and forced marriage started to surface in reports and academic writing focusing on the sexual aspect of the crime.¹⁵⁴ For example, in 2002 Anker made reference to other forms of GBV that were emerging in refugee case law such as *‘forced marriage, forced sterilization, forced abortion, forced prostitution’*.¹⁵⁵ Reports which referenced forced marriage in Sierra Leone were also being considered by the Australian Refugee Tribunal.¹⁵⁶

¹⁵³ *Prosecutor v. Kvočka et al.*, Trial Judgment, Case No.: IT-98-30/1-T, [180] and footnote 343 (*Kvočka Trial Judgment*); See also *‘Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges; An analysis of criminal proceedings before the Court of Bosnia and Herzegovina between 2005 and 2013’* (OSCE 2014) 25, 53 available at <http://www.osce.org/bih/117051?download=true>

¹⁵⁴ Deborah E. Anker, *Refugee Law, Gender and Human Rights Paradigm*, 15 Harv. Hum. Rts. J. 133 (2002) 150 (Anker, *Refugee Law, Gender and Human Rights Paradigm*); Referenced by Oosterveld, *Gender Prosecution at the International Criminal Court*; Australian Migration Review Tribunal - Refugee Review Tribunal; SLE36007, February 2010 citing Women’s Commission for Refugee Women and Children 2002, *Disarmament, Demobilization and Reintegration*, and *Gender-based Violence in Sierra Leone* September 2002

¹⁵⁵ *Ibid*

¹⁵⁶ Australian Migration Review Tribunal - Refugee Review Tribunal; SLE36007, February 2010 citing Women’s Commission for Refugee Women and Children 2002, *Disarmament, Demobilization and Reintegration*, and *Gender-based Violence in Sierra Leone* September 2002 available at

Negotiations on the Rome Statute did not have regard to the *Kvočka* decision, as it was after the Rome Statute came into force. Although the author questions the benefit of that decision given its focus on the sexual aspect of forced marriage. The ICC Prosecutor, Moreno Ocampo, in his first investigation in 2003 into the DRC, could have had regard to the reference to forced marriage in the ICTY decision in *Kvočka*. Although, given the nature of the ICC, he should have considered its inclusion within Article 7 (1) of the Rome Statute.

Ocampo had the option of prosecuting the CAH of sexual violence (in keeping with *Kvočka*) enslavement and indeed sexual slavery. Article 7 (1) (c) of the Rome Statute includes the CAH of '[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'. The ICTY in *Kvočka* appeared to suggest that forced marriage was of a comparable gravity and it too should have been considered by Ocampo.

It was a missed opportunity not to prosecute GBV and forced marriage in *Lubanga*. The link between child soldiers, GBV and forced marriage having been outlined in the Cape Town Principles (discussed above).¹⁵⁷ Moreover, it would have sent a clear message that, notwithstanding, the lack of a reference to forced marriage within the courts statute, it falls within the jurisdiction of the ICC.

The failure to prosecute GBV forced marriage in *Lubanga* goes against the principle ensigned in the preamble of the Rome Statute such that there is an obligation on the international community to prosecute these crimes effectively.¹⁵⁸ Prosecution is a means to achieve the goals of the ICC to end impunity and act as a deterrent to prevent further atrocities.¹⁵⁹ The failure to prosecute also results in a lack of redress and justice on the part of the victim. The failure to prosecute GBV and forced marriage had the potentially foreseen impact of preventing victims from accessing reparations for the crimes which they suffered.

b. Missed opportunity: Failure to prosecute GBV and forced marriage in *Lubanga*

http://www.peacewomen.org/assets/file/Resources/NGO/DDR_AdolescentReconsSierraLeone_WomCommission_AprJuly2002.pdf (last accessed 22nd November 2017) Date in relation to forced marriage was based on interviews with victims.

¹⁵⁷ Joe Tan, *Sexual Violence Against Children on the Battlefield as a Crime of Using Child Soldiers: Square Pegs in Round Holes and Missing Opportunities in Lubanga*, Yearbook of International Humanitarian Law, Volume 15; Volume 2012, 117 at 133

¹⁵⁸ Triestino Mariniello, *The International Criminal Court in Search of its Purpose and Identity*, (Routledge 2015)

¹⁵⁹ Preamble Rome Statute

In September 2003 the Office of the Prosecutor of the ICC indicated its intention to investigate crimes in the DRC referencing reports which ‘*allege a pattern of rape, torture, forced displacement and the illegal use of child soldiers*’.¹⁶⁰ An investigation was formally opened in *Lubanga* in June 2004, in relation to crimes which occurred in the DRC.¹⁶¹ In 2006, some three years on, the arrest warrant for *Lubanga* contained one charge of conscripting and enlisting child soldiers. The Prosecutor failed to prosecute any GBV notwithstanding evidence (discussed below) of sexual slavery and forced marriage.¹⁶² Ocampo was criticised by human rights organisations for his failure to prosecute GBV in *Lubanga*.¹⁶³ Human rights organisations, in a letter to Ocampo, said they were ‘*disappointed that two years of investigation by your office in the DRC has not yielded a broader range of charges*’.¹⁶⁴ The letter also pointed out that the failure to include additional charges could undermine the ‘*credibility of the ICC*’ and it could limit victim participation which could have a bearing on a victim’s right to reparations.¹⁶⁵ The Woman’s Initiative for Gender Justice (WIGJ) and The International Federation for Human Rights (Fédération internationale des ligues des droits de l’homme FIDH) also sent letters criticising the absence of GBV charges. The WIGJ acknowledged the discretion of the prosecutor to decide what to investigate and prosecute; however, they commented it should be done in ‘*in a transparent and principled way*’. Given evidence of GBV in the DRC the WIGJ were ‘*deeply disturbed*’ by the failure to include any reference to investigations being conducted into GBV. In conclusion the letter alleged that the failure to include GBV was due to ‘*ineffective investigations conducted by your office which were limited in scope, poorly directed and displayed a lack of commitment to gather the*

¹⁶⁰ *The Office of the Prosecutor of the International Criminal Court opens its first investigation*, ICC-OTP-20040623-59 (Press release, 23.6.2004) available at <https://www.icc-cpi.int/pages/item.aspx?name=the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation> (ICC Press Release 23.6.2004 on the first investigation at the ICC); Brigid Inder, *Letter from Women’s Initiatives for Gender Justice to Mr. Luis Moreno Ocampo, Chief Prosecutor, International Criminal Court* (2006) available at http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf (last accessed 7 July 2018) (WIGJ Letter to Ocampo)

¹⁶¹ Ibid

¹⁶² *Prosecutor v. Thomas Lubanga Dyilo* Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict ICC-01/04-01/06-1175, 18 February 2008, 11; Anja Wiersing, *Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court*, Amsterdam Law Forum, Vol 4, No 3 (2012), 22

¹⁶³ Avocats Sans Frontières, *D.R. Congo: ICC Charge Raise Concern* (2006, Human Rights Watch, *Joint Letter to the Chief Prosecutor of the International Criminal Court*, July 31 2006 <https://www.hrw.org/news/2006/07/31/dr-congo-icc-charges-raise-concern> (last accessed 7.7.2018); WIGJ Letter to Ocampo (n 160)

¹⁶⁴ Ibid; WIGJ Letter to Ocampo (n 160)

¹⁶⁵ WIGJ Letter to Ocampo (n 160)

relevant information and evidence to enable gender based crimes to be brought against the first indictee at the ICC'.¹⁶⁶

Radhika Coomaraswamy was Special Representative for Children and Armed Conflict between 2006 and 2012. She was previously the UN Special Rapporteur on Violence against Women between 1994 and 2003. In December 2007/January 2008 she sought leave to submit an *amicus curiae* brief in the *Lubanga* case.¹⁶⁷ She was granted permission but only relating to '*The definition of "conscripting or enlisting" children, and, bearing in mind a child's potential vulnerability, the manner in which any distinction between the two formulations (i.e. conscription or enlistment) should be approached; b) The interpretation, focussing particularly on the role of girls in armed forces, of the term "using them to participate actively in the hostilities"*'.¹⁶⁸

Written *amicus curiae* submissions were subsequently provided by Coomaraswamy in *Lubanga*.¹⁶⁹ They referenced forced marriage and the importance of including girls in the definition of a child soldier:

*"The exclusion of girls from the definition of child soldiers would represent an insupportable break from well-established international consensus. The definition of child soldier auxiliary to the Cape Town Principles recognized that "child soldier" includes "girls recruited for sexual purposes and for forced marriage."*¹⁷⁰

The submissions also cited the African Union's Solemn Declaration on Gender Equality, which prohibits child soldiers and the '*abuse of children as wives and sex slaves*'. It concluded by commenting that female combatants can be invisible as they are '*wives and domestic aids*',¹⁷¹

¹⁶⁶ Ibid, FIDH, *Comments on the Office of the Prosecutor draft policy paper on Criteria for selection of situations and cases* (Sept, 2006) available at https://www.fidh.org/IMG/pdf/FIDH_comments_-_selection_criteria_-_final.pdf last accessed (8th July 2018)

¹⁶⁷ WIGJ, *The Prosecutor v. Thomas Lubanga Dyilo Women's Initiatives for Gender Justice*, Gender Report Card on International Criminal Court 2010, 135 (Gender Report Card, 2010)

¹⁶⁸ *Prosecutor v. Thomas Lubanga Dyilo* Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict ICC-01/04-01/06-1175, 18 February 2008, 11

¹⁶⁹ *ibid*

¹⁷⁰ ICC-01/04-01/06-1229-AnxA 18-03-2008, [24] available at https://www.icc-cpi.int/RelatedRecords/CR2008_01287.PDF

¹⁷¹ ICC-01/04-01/06-1229-AnxA 18-03-2008, [24]

and that these girls have children with commanders.¹⁷² It is notable that the submissions referred, amongst other things, to the non-sexual aspect of forced marriage.

Coomaraswamy testified as an expert in *Lubanga* on the 7th January 2010. She outlined that recruited girls can have different roles in a conflict, sometimes they can be a combatant, but they can also be ‘*forced into sexual slavery or bush wives*’.¹⁷³ She was asked by the Office of Public Counsel for the Victims (OPCV) what types of sexual exploitation are suffered by boys and girls in an armed group.¹⁷⁴ Her response illustrates the prevalence of forced marriage:

“Well, there are so many cases of -- first they suffer rape. This happens to girls on a regular basis. Then they suffer forced marriage. They are often given as bush wives.”¹⁷⁵

The Regulations of the ICC Court, more particularly Regulation 55, enables the Chamber to ‘*re-characterise a crime to give it the most appropriate legal characterisation*’.¹⁷⁶ Given the significant evidence before the court with respect to GBV an application was made in 2009 by the legal representatives of the victims to include the CAH and war crime of sexual slavery and the war crime of inhumane treatment but failed.¹⁷⁷

The investigation commenced in 2003 but it was not until 2010 that Coomaraswamy gave evidence. She did so at a time when the first case dealing with forced marriage, namely the AFRC case had been dealt with in the SCSL (considered above).¹⁷⁸ Furthermore, the closing arguments in the RUF case had been completed at the SCSL but a judgment was not issued until the following year.¹⁷⁹ However, the *Lubanga* case had taken so long that forced marriage

¹⁷² ICC-01/04-01/06-1229-AnxA 18-03-2008, para 24

¹⁷³ Ibid ICC-01/04-01/06-T-223-ENG ET WT 07-01-2010, at pg. 14 Line 13/14

¹⁷⁴ Ibid ICC-01/04-01/06-T-223-ENG ET WT 07-01-2010, at pg. 30 Line 22-24 Gender Report Card, 2010, 138

¹⁷⁵ Ibid ICC-01/04-01/06-T-223-ENG ET WT 07-01-2010, at pg. 30 Line 25, pg. 31 Line 1-3 *Gender Report Card 2010* (n 167)138

¹⁷⁶ Regulations of the Court ICC-BD/01-02-07 Bemba (ICC-01/05-01/08), Decision pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, [203]

¹⁷⁷ Chappell, *The gender injustice cascade: ‘transformative’ reparations for victims of sexual and gender-based crimes in the Lubanga case at the International Criminal Court*, The International Journal of Human Rights, 21:9, [1223]-[1242], [1229]; *Prosecutor v Lubanga*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-1891, 22 May 2009; Sienna Merope, *Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC*, Criminal Law Forum 22, no. 3 (2011): 311–46

¹⁷⁸ *AFRC Trial Chamber* (n 8); *AFRC Appeal* (n 8)

¹⁷⁹ *RUF Trial Judgment* (n 8), Closing arguments took place on the 5th of August 2008

had been considered by the ICC two years earlier, in 2008, in *Katanga*. It would take a further eight years for the first prosecution of forced marriage to take place at the ICC.¹⁸⁰

The failure to prosecute GBV in cases such as *Lubanga* raises questions as to whether victims of forced marriage can seek reparations before the ICC if the court fails to prosecute and subsequently convict.¹⁸¹ The case of *Ongwen* marks a turning point for victims of forced marriage and, if the accused is convicted, they have the hope of reparations. The scope of this thesis does not cover reparations to victims at the ICC; however, it is a relevant factor in seeking justice for victims. The relevant point at this stage is that the ICC had sufficient evidence to prosecute forced marriage in *Lubanga* but failed to do so.

Conclusion

The Preparatory Commission of the ICC should have been aware, through numerous international reports, that forced marriage was taking place in conflict situations. Moreover, the characterisation of forced marriage under Article 7 (1) of the Rome Statute was put before the Preparatory Commission in the form of submissions from State Parties and the WCGJ which linked forced marriage to enslavement.¹⁸² These submissions identified the elements of crime of enslavement and sexual slavery at the Rome Statute as including slave-like conditions such as forced marriage.¹⁸³ This was reflected in the subsequent inclusion of a footnote to the elements of the crimes of enslavement and sexual slavery, which broadened the Rome Statute's ability to prosecute slavery like practices which result in a deprivation of liberty. More recent commentators, such as Bunting, Ferme and Hynd, are also of the view that the footnote enables forced marriage to fall under enslavement under Article 7 of the Rome Statute.¹⁸⁴ However none of this analysis explains how forced marriage is now being prosecuted as a CAH of an 'other inhumane act' at the ICC.

¹⁸⁰ *Ongwen* (n 8)

¹⁸¹ Anja Wiersing; *Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court* Amsterdam Law Forum, Vol 4, No 3 (2012) 22-23 <http://amsterdamlawforum.org/article/viewFile/278/459> S. O'Connell, *Gender-based Crimes at the International Criminal Court*, Plymouth Law Review 2010-1, 73-5. 63 Institute for War & Peace, *Special Report Sexual Violence in the Democratic Republic of Congo*, 11 available at <http://www.ceipaz.org/images/contenido/Sexual%20violence%20in%20the%20Democratic%20Republic%20of%20Congo.pdf> (accessed on 12th Jan 2018)

¹⁸² Women's Caucus for Gender Justice, *Submission to the Preparatory Commission*, March 13, 2000 (n 6)

¹⁸³ *Katanga Opening Statement* (n 122)

¹⁸⁴ Bunting et al, *Marriage by Force*, 2016: Introduction (n 9)

At the start of this chapter three scenarios were presented with respect to the intention of the drafters of the Rome Statute with respect to the inclusion of forced marriage in Article 7 (1) of the Rome Statute. First, some States Parties recognised forced marriage as a CAH, but it could not be said, from the available material, that all parties accepted that it was a CAH under Article 7 (1) of the Rome Statute. The second scenario suggested that if forced marriage was not considered by the Preparatory Commission then it might fall under the CAH of an '*other inhumane act*'. As we have seen forced marriage was considered by the Preparatory Commission in the context of an existing CAH and notwithstanding this, forced marriage was prosecuted in *Ongwen* as a CAH of an '*other inhumane act*'. Given the documentation available to the author, the third scenario is the most correct of the three; namely that the drafters of the Rome Statute (for the most part) believed that forced marriage fell under an existing CAH and therefore, at the time of drafting both the Rome Statute and the Elements of Crimes, there was no need to explicitly reference forced marriage as it was believed that it fell under the CAH of enslavement/sexual slavery. Such a conclusion inevitably results in forced marriage falling under an existing CAH under Article 7 (1) of the Rome Statute. This however does not tally with the fact that forced marriage has been prosecuted by the ICC as a CAH of an '*other inhumane act*'. Any intention of the drafters of the Rome Statute with respect to the legal characterisation of forced marriage may be moot, as the ICC and the Rome Statute can be influenced by prosecutorial or judicial discretion (See Chapter 3) on whether to prosecute or characterise forced marriage as one CAH as opposed to another.¹⁸⁵ This evolution and discretion has arguably resulted in forced marriage falling under the CAH of an '*other inhumane act*', notwithstanding that some of the drafters of the Rome Statute foresaw that forced marriage would fall under an existing CAH listed under Article 7 (1) of the Rome Statute.

¹⁸⁵ Cécile Aptel, *Prosecutorial Discretion at the ICC and Victim's Right to Remedy: Narrowing the Impunity Gap*, Journal of International Criminal Justice, Volume 10, Issue 5, 1 December 2012 1357-1375, ICC Regulation 55

Chapter 2

The legal characterisation of forced marriage: the elements of the CAH of an ‘*other inhumane act*’

As discussed in Chapter 1, submissions made to the Preparatory Commission illustrate that forced marriage may fall under the existing CAH of enslavement or sexual slavery under Article 7 (1)(c)-(g) of the Rome Statute.¹ This chapter seeks to ascertain when forced marriage can fall under a CAH and more particularly what elements are needed to prosecute it as the CAH of an ‘*other inhumane act*’ under Article 7 (1) (k) of the Rome Statute.

The fragmentation of ICL is such that forced marriage has been defined as a CAH of enslavement, sexual slavery and an ‘*other inhumane act*’ by both the SCSL and the ICC at one time or another.² In *Taylor* the SCSL defined forced marriage as a forced conjugal association in times of conflict, which includes sexual slavery and forced labour.³ The Pre-Trial Chamber in *Ongwen* considered the jurisprudence of the SCSL in the *RUF* and *AFRC* case defining and confirming the charge of forced marriage as an ‘*other inhumane act*’.⁴ The Pre-Trial Chamber in *Ongwen* ignored, in the author’s view, the SCSL subsequent decision in *Taylor*.⁵ The different view of the SCSL and the ICC with respect to the characterisation of forced marriage illustrates the fragmentation of ICL. The fragmentation of ICL is such that different courts based on similar facts can come to a different legal characterisation of forced marriage.

¹ Women's Caucus for Gender Justice in the International Criminal Court, *Recommendations and Commentary* for December 1997 Prep. Com., Part III: War Crimes, Recommendation 7 (Dec. 1-12, 1997) See <http://www.iccnw.org/documents/5PrepComRecommWomensC.pdf> (last accessed 24th January 2018) (Women’s Caucus for Gender Justice, Dec 1997) ; Human Rights Watch; *Sierra Leone: Getting Away with Murder, Mutilation, Rape - New Testimony from Sierra Leone* July 1999, Vol.11 No 3(A) available at <https://www.hrw.org/reports/1999/sierra/> (last accessed 22nd November 2017)

² *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber II, Judgement, (18th May 2012) (*Taylor*); Valerie Oosterveld, *Gender and the Charles Taylor Case at the Special Court for Sierra Leone*, 19 Wm. & Mary J. Women & L. 7, 34 (2012) (Oosterveld, *Gender and the Charles Taylor Case at SCSL*, 2012); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Confirmation of Charges Hearing, ICC-01/04-01/07, 30 September 2008, [430]-[431] (*Katanga*)

³ *Taylor* (n 2) [425]

⁴ *Prosecutor v Ongwen*; Pre-Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15, 23rd March 2016 [89]

⁵ *Taylor* (n 2); Oosterveld, *Gender and the Charles Taylor Case at SCSL*, 2012 (n 2); Thompson, *Forced Marriage at the Special Court for Sierra Leone: Questions of Jurisdiction, Legality, Specificity, and Consistency* a Chapter in Jalloh (Ed.), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press 2013) 213-233

These issues are not new. Concerns were raised at the Preparatory Commission of the ICC in relation to the vagueness of ‘*other inhumane acts*’.⁶ These concerns were justified particularly given the fragmentation of ICL, as outlined above, and the lack of a codified international document which defined CAH and ‘*other inhumane acts*’.

Part I of this chapter will briefly consider the relevance of the fragmentation of ICL. Part II will discuss the evolution of CAH in international law. Part III will list the elements of a CAH. Part IV will outline the elements of the CAH of an ‘*other inhumane act*’.

I. The relevance of the fragmentation of ICL

The fragmentation of ICL is evident in public international law, including international criminal law. It can and has resulted in ‘*two institutions faced with analogous facts interpret(ing) the law in differing ways*’.⁷ For example the SCSL in *Taylor* and the ICC in *Ongwen* have characterised forced marriage under different CAH. According to Bassiouni, it is ‘*difficult to state what exactly constitutes customary international law*’.⁸ This is illustrated in the discussion below on the evolution of CAH. Crimes which previously might have fallen under the residual category of a CAH of an ‘*other inhumane act*’ have been codified as CAH in their own right.⁹ Beth Van Schaack opines that ‘*the definition of crimes against humanity has been plagued by incoherence*’ and CAH have only recently, in the Rome Statute of the ICC been ‘*the subject of a comprehensive multilateral convention*’.¹⁰ However, fragmentation of ICL ‘*will surely cause difficulties to the ICC as its jurisprudence evolves, particularly because its statute’s definition of CAH is so much broader than other definitions*’.¹¹ Notwithstanding the comprehensive nature of the Rome Statute, it is unclear how CAH, not specifically listed

⁶ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2016) 184-185, See footnote 385 & 387, Preparatory Committee 1996 Report, Vol 1 & Vol II

⁷ C. Wilfried Jenks, *The Conflict of Law-Making Treaties*, BYBIL vol. 30, (1953) p. 403. Cited in ILC Study Group on the Fragmentation of International Law. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006, [51], 32 (Hereafter Koskenniemi, ILC Study Group on the Fragmentation of International Law)

⁸ M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, (Cambridge University Press 2011) 150 (Bassiouni, *Crimes Against Humanity*, 2011)

⁹ *Prosecutor v. Kupreškić et al.*, IT-95-16-A, “Appeal Judgment”, Appeals Chamber, 23 October 2001, (“*Kupreškić Appeal Judgment*”) [565]–[566]; *Prosecutor v Akayesu*, Case No. ICTR-96-4-T (Judgment, September 2, 1998) [688] “*Sexual violence falls within the scope of "other inhumane acts", set forth Article 3(i) of the Tribunal's Statute, "outrages upon personal dignity," set forth in Article 4(e) of the Statute, and "serious bodily or mental harm," set forth in Article 2(2)(b) of the Statute.*”

¹⁰ Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 Colum. J. Transnat'l L. 787, 792

¹¹ Bassiouni, *Crimes Against Humanity*, 2011 (n 8), 150

in the Statute will be defined . Will they form part of the CAH of an ‘*other inhumane act*’ or will they be subsumed by an existing CAH listed under Article 7 (1) of the Rome Statute? This question is made more difficult by the fragmentation of ICL, as jurisprudence from the both the SCSL and the ICC suggest that forced marriage can be prosecuted as a CAH of enslavement, sexual slavery and an ‘*other inhumane act*’.

The impact of the fragmentation of ICL is further illustrated by how the SCSL and the ICC have defined forced marriage. Forced marriage has been prosecuted by the SCSL as sexual slavery in *Taylor*¹² and was previously defined as an ‘*other inhumane act*’ in the *AFRC* case.¹³ The first conviction for forced marriage as a CAH was in the *RUF* case.¹⁴ The ICC in *Katanga* indicated that forced marriage could amount to sexual slavery but has more recently held in *Ongwen* that forced marriage can amount to the CAH of an ‘*other inhumane act*’.¹⁵ The fragmentation of ICL and the resulting different definitions and characterisations of forced marriage, result in vagueness, making it difficult for individuals to predict whether an international court will prosecute forced marriage and what CAH it might be prosecuted as.¹⁶ While the fragmentation of international law may lead to issues between different courts of tribunals, the lack of precedent causes further confusion between courts and within courts. This is further illustrated in the jurisprudence of the SCSL and the ICC on forced marriage, with each case potentially setting a different precedent as to the legal characterisation of forced marriage. Notwithstanding that *Taylor* was the most recent case considering forced marriage at the SCSL it was not considered by the ICC Pre-Trial Chamber in *Ongwen*. In effect the ICC decided to ignore it. Even if the ICC decides to prosecute forced marriage as an ‘*other inhumane act*’, precedent and the fragmentation of ICL suggests that it may decide to define it as a different CAH in the future and they may be justified in doing so based on precedent. Prosecutorial discretion, considered in Chapter 3, may also have a part to play in this.

¹² *Taylor* (n 2), Oosterveld, *Gender and the Charles Taylor Case at SCSL*, 2012 (n 5)

¹³ *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-A, Appeals Chamber, Judgement (February 22, 2008) (Hereafter *AFRC Judgement*)

¹⁴ *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* [2009] SCSL-04-15-T (Special Court for Sierra Leone, Trial Chamber) 2 March 2009 [Hereafter *RUF Judgment*] See Del Vecchio, Jennifer; *Continuing Uncertainties: Forced Marriage as a Crime Against Humanity*, Rapoport Centre Human Rights Working Paper Series 3/2011 Available at <<http://blogs.utexas.edu/rapoportcenterwps/files/2010/12/3-2011-Del-Vecchio-ContinuingUncertainties.pdf>>

¹⁵ *Ongwen* (n 4) [87]-[90], *Katanga* (n 2) [430]-[431]

¹⁶ Koskeniemi, *ILC Study Group on the Fragmentation of International Law* (n 6) [52], 32

The fragmentation of ICL is demonstrated by a brief consideration of the evolution of CAH. In effect the status of CAH ‘*under international law cannot be understood or appreciated without reference to its history*’.¹⁷ It is therefore important to consider the evolution of CAH and what, if any, are the elements of a CAH. Only by understanding what CAH is can we then determine whether forced marriage falls under Article 7 (1) of the Rome Statute.

II. The evolution of CAH

The Rome Statute and the statutes of the ICTY and the ICTR, in addition to the jurisprudence of both of the latter courts ‘*affirm*’ that CAH form part of customary international law; however, as will be discussed below, the definition of what is a CAH has evolved over time.¹⁸ This is illustrated by the fact that crimes or offences which once fell under the category of a CAH and under the CAH of an ‘*other inhumane act*’, have evolved to become a distinct CAH. The successful prosecution of crimes under ‘*other inhumane acts*’, has resulted in crimes such as sexual slavery,¹⁹ forced disappearance,²⁰ forcible transfer,²¹ sexual violence²² being specifically articulated in subsequent statutes. In the author’s view, the prosecution of ‘*other inhumane acts*’, appears to mark a stepping stone to the creation of a ‘*new*’ CAH.²³

a. Defining CAH: The London Agreement & Control Council no 10.

¹⁷ Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 Colum. J. Transnat’l L. 787

¹⁸ Ibid, 792; Bassiouni, *Crimes Against Humanity*, 2011 (n 8) [150] Cherif Bassiouni, “*Crimes Against Humanity: The Need for a Specialized Convention*”, 31 COLUM. J. TRANSNAT’LL. 457 (1994)

¹⁹ UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002, Article 2 (g); Article 7 (1) (g) Rome Statute; Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int’l L. 605 (2004),

²⁰ *Draft Code of Crimes against the Peace and Security of Mankind*, 1996, Article 18 (i) (n 26)

²¹ *Kupreškić Appeal Judgment* (n 9) [565]–[566]

²² *Akayesu* (n 9) [688]

²³ Jennifer Gong-Gershowitz, *Forced Marriage: A “New” Crime Against Humanity?* 8 Nw. J. Hum Rts 53 (2009) 53-76 (Gershowitz, A ‘New’ Crime Against Humanity, 2009); Fionnuala Ní Aoláin, Naomi Cahn, Nahla Valji, Dina Francesca Haynes (editors); *The Oxford Handbook of Gender and Conflict*; Oxford University Press (2017) See Chapter 18 Oosterveld, ‘*Forced Marriage During Conflict and Mass Atrocity*’, 240 (Oosterveld, ‘*Forced Marriage During Conflict and Mass Atrocity*’ in the Oxford Handbook of Gender Conflict); Bunting, *Forced Marriage in Conflict Situations: Researching and Prosecuting Old Hard and New Crimes*, Canadian Journal of human Right’s 1, no. 1: 165-185 (Bunting, *Forced Marriage in Conflict Situations*) Annie Bunting, Benjamin N. Lawrance, Richard L. Roberts, edn ‘*Marriage by Force?: Contestation over Consent and Coercion in Africa*’, Ohio University Press. 2016; Introduction, Something Old, Something New (Bunting et al, *Marriage by Force*, 2016: Introduction); Frulli, *Advancing International Criminal Law: The Special Court of Sierra Leone Recognised Forced Marriage as a ‘New’ Crime against Humanity* Journal of International Criminal Justice (2012) 6, 1022-1042;

Notwithstanding, a reference to CAHs in the 1915 Declaration the Armenian Genocide,²⁴ CAH were first enumerated under the Charter of the International Military Tribunal of Nuremburg, which was annexed to the London Agreement of 8th August 1945²⁵ and later in the Charter of the International Military Tribunal for the Far East²⁶ and Control Council Order No. 10.²⁷

It has been suggested that the London Agreement simply codified what was already accepted practice, namely that CAH should be prosecuted.²⁸ Case law from the Tribunals provided that the London Agreement was not an attempt *‘by their terms to create new crimes. They clearly proceed upon the assumption that certain acts were criminal under existing international law at the time of their enactment’*.²⁹ Antonio Cassese has stated that *‘it seems more correct to content that the provision constituted new law’*.³⁰ Bassiouni has asked whether *‘the Charter’s legislative enactment constituted a codification of pre-existing customary law, or whether it was declarative of a new custom that was, until then, in the making’*.³¹ Bassiouni notes that the answer provided by the London Charter drafters, the International Military Tribunal (IMT) prosecutors and the judges was that the *‘Charter was declarative of a new custom’ and therefore did not violate the principle of legality*.³² In other words, the London Charter just *‘codified a pre-existing custom in the making’*.³³

²⁴ Declaration by the governments of France, Great Britain and Russia, Department of State, Washington DC, May 29, 1915 available at http://www.armenian-genocide.org/popup/affirmation_window.html?Affirmation=160 (last accessed 7th July 2018)

²⁵ Antonio Cassese, Paola Gaeta & John R. W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 353, 354-55 (Antonio Cassese, Paola Gaeta & John R. W.D. Jones, eds., Oxford University Press 2002 (Cassese et al, *Crimes Against Humanity*, 2002)

²⁶ *International Military Tribunal for the Far East*, Proclaimed at Tokyo, 19 January 1946, amended 26 April 1946, TIAS No. 1589, entered into force 19 January 1946 (IMTFE) Annex, Charter of the International Military Tribunal for the Far East (Tokyo) [Known as the IMTFE Charter or Tokyo Charter] Available at <http://droitcultures.revues.org/2183> (last accessed 7th July 2018) (IMT for the Far East Charter)

²⁷ Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946). Available at <http://avalon.law.yale.edu/imt/imt10.asp> (last accessed 7th July 2018) (Control Council No 10)

²⁸ *United Nations War Crimes Commission Report*, U.N. Doc. E/CN.4/W.20 (May 28, 1948) 191–220. 685 G.A. Res. 3074, 28 U.N. GAOR available at <http://www.genocide-museum.am/eng/1948.php> (last accessed 7th July 2018) Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, *Fordham International Law Journal* Volume 22, Issue 2 (1998) 457, 460 available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1594&context=ilj>

²⁹ *Trials of War Criminals before the Nurnberg Military Tribunals*, Volume XIII, *“The Ministries Case”* 115 Available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIII.pdf

³⁰ Cassese et al, *Crimes Against Humanity*, 2002 (n 25) 354-55; Antonio Cassese, *International Criminal Law*, (2nd ed Oxford University Press, 2008) 105

³¹ Bassiouni, *Crimes Against Humanity*, 2011 (n 8) 147

³² Ibid

³³ Bassiouni, *Crimes Against Humanity*, 2011 (n 8) 147

If it simply codified custom when why were only limited charges brought? Askin suggests that sexual violence could have been prosecuted as a war crime at the Nuremburg trials under Article 6 (b) given the evidence before the court of sexual violence and the wording of the charter.³⁴ De Brouwer goes one step further stating that sexual violence could have also been prosecuted under the heading of CAH of ‘*other inhumane acts*’, or under ‘*enslavement*’.³⁵ Similarly, the CAH of rape could also have been prosecuted as it was already a war crime and ‘[o]n the basis of ‘*general principles of law*’, a source of international law, rape and most of the other crimes listed were crimes already recognised by the major legal systems in the world’.³⁶

When Control Council Order No. 10 came into being, the London Agreement had been in force for over four months and the Nuremburg Trials had begun.³⁷ Control Council Order No. 10 saw the concept of CAH evolve, including the types of crimes that amounted to a CAH. There were differences between CAH as articulated by the London Charter and those outlined in Article II (1) of Control Council Order No. 10. The latter included the additional CAH, namely, imprisonment, torture and rape, not previously listed by the earlier Tribunals.³⁸ Crimes, which arguably would have fallen under an ‘*other inhumane act*’ under the London Agreement and the International Military Tribunal for the Far East.

Telford Taylor, Chief Prosecuting Counsel at the Nuremburg Trials, opined that these differences were done deliberately, this therefore could also be said of the including of additional crimes such as rape and torture.³⁹

³⁴ Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Dordrecht: Martinus Nijhoff Publishers 1997), 138-139 (Askin, *War Crimes Against Women*, 1997) Askin goes onto say that there was ‘*significant overlap between charges of war crimes and crimes against humanity*’ but there was a preference at the Nuremburg trials to prosecute the crimes as war crimes rather than crimes against humanity.

³⁵ Anne-Marie L.M. de Brouwer, *Supernatural Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005) (de Brouwer, *Supernatural Criminal Prosecution of Sexual Violence*, 2005)

³⁶ Ibid, 7

³⁷ Telford Taylor; *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law NO. 10* (U.S. Government Printing Office, Washington 25, D.C.) 15th August 1949; 8 available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf (last accessed 7th July 2018) (Telford Taylor Final Report, Aug 1949)

³⁸ Marie-Claude Roberge; *Jurisdiction of the ad hoc Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide*, International Review of the Red Cross, No. 321, 31-12-1997 available at <http://www.icrc.org/eng/resources/documents/misc/57jnz3.htm> (last accessed 7th July 2018)

³⁹ Telford Taylor *Final Report*, Aug 1949 (n 37) 8

‘The differences between the definitions of the Charter and Law No. 10 were patent, and one must presume that the Control Council was aware of them, and deliberately adopted definitions different from those of the Charter, intending the differences to be meaningful. But even this presumption-logical and in accord with accepted canons of construction as it was-was beclouded by other language in Article I of Law No. 10, providing that the London Agreement and Charter (as well as the Moscow Declaration) was an "integral part" of Law No. 10.’⁴⁰

At that time international law was evolving. Taylor opines that there were no international statutes nor was there a body with international sovereignty (court) which had jurisdiction that could govern international statutes.⁴¹ Therefore, a different court, with a different statute could come to a different conclusion in relation to the application of the law. Taylor therefore commented that it was not surprising that the texts should differ and as he puts it, *‘it is in no way remarkable that the Charter and Law No. 10 are not identical. It would, in fact, be remarkable if they were identical, unless the sole intention of the latter was to copy the former. Nor is either intended to be a complete statement of the entire content of international penal law.’⁴²*

Taylor’s comments could have been made about the prosecution of forced marriage at the SCSL and the ICC. They illustrate that the fragmentation of international law was an issue in 1949 and it still is relevant today. Moreover it confirms Bassiouni’s comment that it is difficult to understand what amounts to customary international law and what exactly is a CAH.⁴³

b. The International Law Commission & the codification of CAH

A Draft Code of Offences against the Peace and Security of Mankind was completed by the ILC in 1954. Article 2 of the Draft Code listed the acts which amounted to an offence against the Peace and Security of Mankind.⁴⁴ The Draft Code made no direct reference to CAH;

⁴⁰ *ibid*

⁴¹ Telford Taylor *Final Report*, Aug 1949 (n 37) 9

⁴² *ibid*

⁴³ Bassiouni, *Crimes Against Humanity*, 2011 (n 8) 150

⁴⁴ *Draft Code of Offences against the Peace and Security of Mankind 1954*; Text adopted by the International Law Commission at its sixth session, in 1954, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (at para. 54). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission*, 1954, vol. II. Available at http://untreaty.un.org/InternationalLaw/Commission/texts/instruments/english/draft%20articles/7_3_1954.pdf (last accessed 7th July 2018) (*Draft Code of Offences against the Peace and Security of Mankind 1954*) Earlier work includes the Statute of the International Law Commission 1947; Adopted by the General Assembly in resolution 174 (II) of 21 November

however, Article 2 (11) referred to the offence of “*‘inhumane acts’ such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.*” The definition also omitted any link or nexus to a war for the prosecution of ‘*inhumane acts*’. The General Assembly Resolution 897 (IX) of 4 December 1954⁴⁵ failed to adopt the code and it postponed the issue until there was a consideration of the definition of aggression by a Special Committee.⁴⁶ This was arguably a missed opportunity to codify ICL with respect to CAH.⁴⁷

In 1981, UN Resolution 36/106 requested that the ILC resume work on the Draft Code,⁴⁸ which resulted in the publication of a *Draft Code of Crimes against the Peace and Security of Mankind* in 1991.⁴⁹ The 1991 Draft Code contained twelve crimes, with no direct reference to the term CAH or ‘*other inhumane acts*’.⁵⁰ Article 21 of the Draft Code included acts that were previously identified in the Nuremburg Charter and Control Council Order No. 10 as CAH. Moreover, it included ‘*slavery, servitude or forced labour.*’ As discussed in Chapter 1 servile

1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981. Available at http://untreaty.un.org/InternationalLawCommission/texts/instruments/english/statute/statute_e.pdf (last accessed 7th July 2018) Yearbook of the International Law Commission, 1950, vol. II, [39] [129] 190, 193-195 available at

[http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1950_v1_e.pdf](http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1950_v1_e.pdf) (last accessed 7th July 2018)

⁴⁵ General Assembly by Resolution 897 (IX) Draft Code of Offences against the Pace and Security of Mankind of 4 December 1954 available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/096/32/IMG/NR009632.pdf?OpenElement> (last accessed 7th July 2018)

See also Resolution 1186 (XII) of 11th December 1957

⁴⁶ General Assembly by Resolution 897 (IX) *Draft Code of Offences against the Pace and Security of Mankind of 4 December 1954, Draft Code of Offences against the Peace and Security of Mankind 1954*, also Article 2 (1) (n 44)

⁴⁷ Bassiouni, *Crimes Against Humanity*, 2011 (n 8) 183

⁴⁸ *Draft Code of Offences against the Peace and Security of Mankind* A/RES/36/106 10th December 1981 available at <http://www.un.org/depts/dhl/resguide/r36.htm> (last accessed 7th July 2018) (*Draft Code of Offences against the Peace and Security of Mankind*, 1981)

⁴⁹ *Draft Code of Crimes against the Peace and Security of Mankind*. Titles and texts of articles adopted by the Drafting Committee: Parts One and Two; articles 1-26 - reproduced in A/CN.4/SR.2236 to SR.2237 and SR.2239 to 2241 available at http://untreaty.un.org/InternationalLawCommission/documentation/english/a_cn4_l459.pdf (last accessed 7th July 2018)

Martin C. Ortega, *The International Law Commission Adopts the Draft Code of Crimes Against the Peace and Security of Mankind*, Max Planck Yearbook of United Nations Law, Vol 1, 1997, 283 -326 available at http://www.mpil.de/files/pdf1/mpunyb_ortega_1.pdf (last accessed 7th July 2018) Jean Allain and John R. W.D. Jones, *A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind* EJIL (1997) 100-117 available at <http://ejil.org/pdfs/8/1/1401.pdf> (last accessed 7th July 2018)

⁵⁰ *Draft Code of Crimes against the Peace and Security of Mankind*, 1996 Yearbook of the International Law Commission, 1996, vol. II (Part Two) A/RES/51/160 16th December 1996 (*Draft Code of Crimes against the Peace and Security of Mankind*, 1996)

marriage or forced marriage could fall within this terminology, which derives from the slavery conventions.⁵¹

The 1996 Draft Code bore little resemblance to its 1954 counterpart and bore more likeness to the statute of the ICC. It marked a major step in the codification of international criminal law. In fact, General Assembly 51/160 of the 16th December 1996 drew Member States ‘*participating in the Preparatory Committee on the Establishment of an International Criminal Court to the relevance of the draft Code to their work*’.⁵² The link between the two is understandable given that the Draft Statute of the ICC was adopted in 1994, two years previously.⁵³ The 1994 Draft of the ICC looks very different to what is now known as the Statute of the ICC, namely the Rome Statute. Article 20 of the Draft ICC Statute gave jurisdiction to an international court to prosecute five crimes, namely genocide,⁵⁴ the crime of aggression, serious violations of the laws and customs applicable in armed conflict; CAH; and crimes, which were listed in the Annex that were established under or pursuant to the treaty provisions and constituting very serious crimes.⁵⁵ The Draft Statute of the ICC did not expand on the elements of CAH. The Draft Code of Crimes against the Peace and Security of Mankind in 1996 reduced the list of crimes from twelve in the 1991 draft, to five, namely, the crime of aggression,⁵⁶ the crime of genocide⁵⁷, CAH,⁵⁸ crimes against the United Nations and associated

⁵¹ The footnote to the elements of crime of enslavement and sexual slavery states:

‘It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children’, ICC Elements of Crime, Crime against Humanity of Enslavement pg. 6, footnote 11. Crime against Humanity of Sexual Slavery Pg. 8, footnote 11

⁵² General Assembly 51/160 Report of the International Law Commission on the work of its forty-eighth session A/RES/51/160, 16th December 1996; Martin C. Ortega, *The International Law Commission Adopts the Draft Code of Crimes Against the Peace and Security of Mankind*, Max Planck Yearbook of United Nations Law, Vol 1, 1997, 284

⁵³ *Draft Statute for an International Criminal Court 1994*; Text adopted by the Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1994, vol. II (Part Two) available at http://untreaty.un.org/InternationalLawCommission/texts/instruments/english/draft%20articles/7_4_1994.pdf (last accessed 7th July 2018) (Draft Statute for the International Criminal Court, 1994)

⁵⁴ *Draft Code of Crimes against the Peace and Security of Mankind, 1996* (n 50) Article 20 (a)

⁵⁵ *Draft Code of Crimes against the Peace and Security of Mankind, 1996* (n 50) Article 20

⁵⁶ *Draft Code of Crimes against the Peace and Security of Mankind, 1996*, Article 16 (n 50)

⁵⁷ *Draft Code of Crimes against the Peace and Security of Mankind, 1996*, Article 17 (n 50)

⁵⁸ *Draft Code of Crimes against the Peace and Security of Mankind, 1996*, Article 18 (n 50)

personnel⁵⁹ and war crimes.⁶⁰ Article 18 of Draft Code of Crimes against the Peace and Security of Mankind in 1996 was significantly more detailed and of more assistance than the Draft Statute of the ICC as it outlined the acts and elements of a CAH. The Draft Statute of the ICC arguably benefited from the work done on the Draft Code of Crimes.

Article 18 of the Draft Code of Crimes provided that “*a crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: (a) Murder; (b) Extermination; (c) Torture; (d) Enslavement; (e) Persecution on political, racial, religious or ethnic grounds; f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; (g) Arbitrary deportation or forcible transfer of population; (h) Arbitrary imprisonment; (i) Forced disappearance of persons; (j) Rape, enforced prostitution and other forms of sexual abuse; (A) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm*”

Like Article II of Control Council Order No. 10, Article 18 did not require a nexus to an armed conflict; however, it required that any CAH be committed as part of a widespread or systematic attack. Also, the list of CAH was extensive and included additional crimes not previously listed as CAH such as forcible transfer of population;⁶¹ forced disappearance of persons;⁶² enforced prostitution and other forms of sexual abuse.⁶³

Several delegations at the Preparatory Committee for the ICC in 1996, ‘*noted the absence of a generally accepted definition of crimes against humanity under treaty law*’.⁶⁴ This statement was made having regard to the Nuremburg and Tokyo Charter, Control Council Order No. 10, the Code of Crimes against the Peace and Security of Mankind and the Statutes of the ICTY and ICTR which all provided for the prosecution of CAH. In advance of the establishment of the ICC there was therefore some uncertainty as to the definition of CAH in international law.

⁵⁹ *Draft Code of Crimes against the Peace and Security of Mankind, 1996*, Article 19 (n 50) The crime against United Nations and associated personnel is said to have been included in the Draft Code at the last minute for more information see Martin C. Ortega, *The International Commission Adopts the Draft Code of Crimes Against the Peace and Security of Mankind*, Max Planck Yearbook of United Nations Law, Vol 1, 1997, 284

⁶⁰ *Draft Code of Crimes against the Peace and Security of Mankind, 1996*, Article 20 (n 50)

⁶¹ *Draft Code of Crimes against the Peace and Security of Mankind, 1996*, Article 18 (g) (n 50)

⁶² *Draft Code of Crimes against the Peace and Security of Mankind, 1996*, Article 18 (i) (n 50)

⁶³ *Draft Code of Crimes against the Peace and Security of Mankind, 1996*, Article 18 (i) (n 50)

⁶⁴ Preparatory Committee on the Establishment of an International Criminal Court; *Summary of the Proceedings of the Preparatory Committee during the period 25th March-12th April 1996* UN A/AC.249/1, 7 May 1996 [43]

The absence of a definition was understandable given that some Statutes listed more acts which amounted to CAH than others while the elements of the CAH varied from one statute to another.⁶⁵

Bassiouni opines that the *'ICL changes in the 1954, 1991, 1994 and 1996 indicate political uncertainty. But the uncertainty with which the drafters proceeded, and their vacillation, evidences how politically sensitive the ILC had become. Of greater significance is the fact that the main problems with the definition of CAH and the identification of its elements have still not been resolved, while there is still no specialized international convention. The result was a haphazard accumulation of unrelated provisions that, for the most part, would not meet the principle of legality in most major criminal justice systems. Thus the ILC missed a historic opportunity to progressively codify ICL, or at least a portion of it, in a manner that would withstanding legal criticism.'*⁶⁶

Bassiouni made these comments in 2011. He was of the view, even then, that the elements and definition of CAH had still not been clearly identified. This is, in the author's view, illustrated by the inconsistency by both the SCSL and the ICC on the legal characterisation of forced marriage as a CAH. The fragmentation of ICL is such that the definition of forced marriage and its legal characterisation may not yet be defined to such an extent that they amount to customary international law. The definition of forced marriage may be unclear, however, the author argues that this is a different argument to whether forced marriage should and can be prosecuted as a CAH under Article 7 (1) of the Rome Statute. As discussed in the introduction to this thesis prosecuting forced marriage is important to achieve the aims and goals of the ICC. That being said, the elements of CAH must be very clear to enable it to be prosecuted and to satisfy the principle of legality. The different legal characterisations at the SCSL and the ICC of forced marriage as a CAH as an *'other inhumane act'*, sexual slavery and or enslavement, certainly do not lend itself to a crime that has been clearly defined by ICL.

c. CAH in the Ad Hoc Tribunals and the ICC

⁶⁵ Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, Duke Journal of Comparative & International Law Vol 10, 307 available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1219&context=djcil> (Last accessed 27th April 2018)

⁶⁶ Bassiouni, *Crimes Against Humanity*, 2011 (n 8) 183

The CAH listed in Article II (c) of Control Council Order No. 10 were subsequently listed by Article 5 of the ICTY,⁶⁷ Article 3 of the ICTR Statute,⁶⁸ Article 2 of the SCSL Statute,⁶⁹ Article 5 of the Law of the ECCC⁷⁰ and Article 7 of the ICC Statute.⁷¹ These acts are *murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; and other inhumane acts*.⁷² In addition to the crimes listed by the SCSL Statute included the CAH of *sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence*.⁷³ The ICC also provided for the CAH of *sexual slavery, enforced prostitution, forced pregnancy*, but it added *enforced sterilization and any other form of sexual violence of comparable gravity*.⁷⁴

The Statutes of ICTY and the ICTR ‘*were tailored to fit the facts,*’ of each jurisdiction and ‘*were not necessarily drafted with a view towards future application, nor did they evidence much concern about the principle of legality*’.⁷⁵ Notwithstanding this, the definitions of CAH as enumerated by the ICTY and the ICTR influenced the work of the Preparatory Commission of the ICC.⁷⁶ During the drafting of the Rome Statute there was confusion as to the definition of CAH as ‘*there was no convention containing a generally recognized and sufficiently precise juridical definition of crimes against humanity*’.⁷⁷ This was due to the fact that over time the

⁶⁷ Security Council Resolution 827 (1993) S/RES/827, Adopted by the Security Council at its 3217th meeting. on 25 May 1993; UN Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993) [Contains text of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991], 3 May 1993, S/25704,

⁶⁸ United Nations Security Council Resolution 955 *Establishing the International Tribunal for Rwanda* (with Annexed Statute), S.C. res. 955, 49 U.N. SCOR at U.N. Doc. S/RES/955 (1994) (Statute ICTR)

⁶⁹ United Nations Security Council, ‘*Statute of the Special Court for Sierra Leone*’, Security Council Resolution Number 1315, 16 January 2002.

⁷⁰ United Nations Security Council, ‘*Statute of the Special Court for Sierra Leone*’, Security Council Resolution Number 1315, 16 January 2002. (Statute of the SCSL)

⁷¹ U.N. *Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/Conf.183/9 (1998).

⁷² *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* (Adopted 25 May 1993 by Resolution 827) (As amended 13 May 1998 by Resolution 1166) (As amended 30 November 2000 by Resolution 1329) (As amended 17 May 2002 by Resolution 1411) (As amended 14 August 2002 by Resolution 1431) (As amended 19 May 2003 by Resolution 1481) (As amended 20 April 2005 by Resolution 1597) (As amended 28 February 2006 by Resolution 1660) (As amended 29 September 2008 by Resolution 1837) (As amended 7 July 2009 by Resolution 1877) (Statute of the ICTY)

⁷³ Statute of the Special Court for Sierra Leone, Article 2 (g) (n 70)

⁷⁴ Rome Statute, Article 7 (1) (g)

⁷⁵ Bassiouni, *Crimes Against Humanity*, 2011 (n 8)183

⁷⁶ *Ibid*, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/50/22 (Sept. 6, 1995) [77]-[78], 16-17 (*Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 1995)

⁷⁷ *Ibid*, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 1995 [78] 17

draft ILC Reports had provided different lists of CAH (see above).⁷⁸ The Preparatory Committee acknowledged that the CAH listed in earlier charters and statutes could provide ‘guidance’ in defining CAH.⁷⁹ However, there was recognition of ‘*the need to reconcile differences in those definitions and to further elaborate the specific content of such offences as extermination, deportation and enslavement.*’⁸⁰ Clarification was also required with respect to the definition of an ‘*other inhumane act*’.⁸¹

The work of the Preparatory Committee (as outlined in Chapter 1) resulted in a list of CAH which included additional crimes, not specifically provided for by previous statutes of the ad hoc tribunals. Some of these crimes had been prosecuted by the ad hoc tribunals as an ‘*other inhumane act*’. This occurred despite differing views as to what acts should be included in Article 7 (1) of the Rome Statute:⁸²

These ‘new’ CAH, not previously enumerated in earlier statutes, are : *forcible transfer of population;*⁸³ *imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*⁸⁴ *persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*⁸⁵ *enforced disappearance of persons.*⁸⁶

The differences between the acts listed as CAH in the Rome Statute and the statutes of the ad hoc tribunals further illustrate the fragmentation of ICL. The ICTY, ICTR, ECCC could prosecute sexual violence under the CAH of ‘*other inhumane acts*’, notwithstanding that the act is not specifically listed under the courts’ statutes. Arguably, forced marriage as a CAH could also be prosecuted as an ‘*other inhumane act*’ once it satisfied the elements of an ‘*other inhumane act*’. One major difference with respect to the Rome Statute and the statutes of the ad hoc tribunals in relation to the CAH of enslavement and sexual slavery is the addition of a

⁷⁸ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), 141

⁷⁹ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 1995 (n 76) [78] 17

⁸⁰ *ibid*

⁸¹ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 1995 (n 76) [78] 17

⁸² Preparatory Committee on the Establishment of an International Criminal Court; *Summary of the Proceedings of the Preparatory Committee during the period 25th March-12th April 1996* UN A/AC.249/1, 7 May 1996, [43]

⁸³ Rome Statute, Article 7 (1) (d)

⁸⁴ Rome Statute, Article 7 (1) (e)

⁸⁵ Rome Statute, Article 7 (1) (h)

⁸⁶ Rome Statute, Article 7 (1) (i)

footnote in the ICC Elements of Crime.⁸⁷ As discussed in Chapter 1, this footnote defines deprivation of liberty in terms of the Slavery Convention of 1956, making reference to forced labour, servile status and trafficking.⁸⁸ In light of this footnote, and as discussed in Chapter 1, Bunting, Ferme and Hynd have commented that forced marriage, in the context of ‘*bush wives*’ of Sierra Leone would fall within enslavement under Article 7 of the Rome Statute.⁸⁹ Notwithstanding this, the ICC in *Ongwen* has held that forced marriage can fall under the CAH of an ‘*other inhumane act*’.

Given an assessment of the evolution of CAH, the work of the Preparatory Commission of the ICC in Chapter 1 and the jurisprudence of the SCSL and the ICC, the author is of the view that forced marriage can amount to a CAH in principle. There is a caveat, forced marriage as a CAH must satisfy three criteria. First, forced marriage must satisfy the elements of a CAH. Secondly, the offence must not fall within an existing category of a CAH. Thirdly, the act must be of a comparable gravity as an existing CAH.⁹⁰

III. The elements of a CAH

Given the limited nature of this thesis it is not possible to go into detail with respect to each of the elements of a CAH.⁹¹ The elements are only briefly outlined below for this reason. It is important to note that the elements of a CAH may vary depending on the statute or court involved.

The following elements must be considered to determine whether an act, such as forced marriage, amounts to a CAH:⁹²

⁸⁷ ICC Elements of Crime, Crime against Humanity of Enslavement 6, footnote 11. Crime against Humanity of Sexual Slavery 8, footnote 11

⁸⁸ Ibid, Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int'l L. 605 (2004), 634; Bunting et al, *Marriage by Force*, 2016: Introduction (n 23)

⁸⁹ Ibid

⁹⁰ Champion, Lee, Hyde, Trumbull; ‘*Research Paper: Special Court for Sierra Leone - Forced marriage as an “other inhumane act”*’, Mallesons Stephen Jaques; 3 September 2010, 8 Available at http://www.redcross.org.au/files/2010_Forced_Marriage_Sierra_Leone.pdf (last accessed 7th July 2018) (Champion, Lee, Hyde, Trumbull; ‘*Research Paper: Special Court for Sierra Leone - Forced marriage as an “other inhumane act”*’)

⁹¹ *Prosecutor v. Dragan Nikolić aka “Jenki”*; IT-94-2-R61; Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20th October 1995 [26]

⁹² *Prosecutor v. Kunarac et al*, IT-96-23-T & IT-96-23/1-T, Trial Judgment, 22 February 2001 [410]-[411] (Kunarac) *Prosecutor v Blagojević & Jokić* (Case No IT-02-60-T) Trial judgment 17 January 2005 [541]-[542] (Blagojević & Jokić); *Prosecutor v Kaing Guek Eav “Duch”* Case No 001/18-07-2007-ECCC/TC (Trial Judgment and Sentence) 26 July 2010, [297]-[319] (Duch)

A. An attack

The definition of attack is separate and distinct from an ‘armed attack’⁹³. An attack can form part of an ‘armed attack’ but an attack can also take place in peacetime and before or after an armed attack has taken place.⁹⁴ The ICTY has held that ‘an “attack” can be described as a course of conduct involving the commission of acts of violence.’⁹⁵ Furthermore, the act or offence needs ‘only to form a part of the attack or, as it was put by the Appeals Chamber, to “comprise[s] part of a pattern of widespread and systematic crimes directed against a civilian population”’.⁹⁶

The Elements of Crime of the ICC have held that an ‘attack’ need not be a ‘military attack’.⁹⁷ In an attack there can be a number of different types of violence such as rape, murder and sexual violence.⁹⁸

B. Widespread or systematic⁹⁹

⁹³ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal Chamber, 15 July 1999 [251] (*Tadić, Appeal Chamber*)

⁹⁴ Ibid, Gideon Boas, James L. Bischoff, Natalie Reid, *International Criminal Law Practitioners Library, Vol II: Elements of Crimes Under International Law* (Cambridge University Press 2008) 41-42; *Duch* (n 92) [299]

⁹⁵ *Kunarac* (n 92) [415]; *Tadić, Appeal Chamber* (n 93) [251] see also *Prosecutor v. Nahimana et al.*, Judgment, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007 [918] (*Nahimana et al.*, Judgment ICTR Appeals Chamber); *Duch* (n 92) [298]-[299]

⁹⁶ *Kunarac* (n 92) [417]

⁹⁷ International Criminal Court (ICC), Elements of Crimes, 2011, (ICC-PIDS-LT-03-002/11_Eng) 5 Available at <http://www.icc-cpi.int/nr/rdononlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 153

⁹⁸ *Duch* (n 92) [298] citing, *Nahimana et al.*, Judgment ICTR Appeals Chamber (n 95) [915]-[918] which cited *Prosecutor v. Kayishema et al.*, Judgment, ICTR Trial Chamber (ICTR-95-1-T), 21 May 1999 [122]

⁹⁹ In order for a crime against humanity to be successfully prosecuted there must be a widespread or systematic attack. Article 5 of the ICTY Statute made no reference to a systematic or widespread attack. Rather, as Cassese notes, such a requirement is provided for by the *UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, which included the text of the ICTY Statute. This report also outlined what it meant by a crime against humanity and it provides that:-

“Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called “ethnic cleansing” and widespread and systematic rape and other forms of sexual assault, including enforced prostitution” [Emphasis added] The ICTY in *Prosecutor v. Nikolić* used the term ‘organised and systematic’ requiring that both elements be present for a successful prosecution:- *“First, the crimes must be directed at a civilian population, specifically identified as a group by the perpetrators of those acts. Secondly, the crimes must, to a certain extent, be organised and systemic. Although they need not be related to policy established at State level, in the conventional sentence of the term, they cannot be the work of isolated individuals alone. Lastly, the crimes, considered as a whole, must be of a certain scale and gravity.”* Case law has held that terms widespread and systematic are alternatives. In coming to this conclusion the ICTY in *Tadić* (n 93) relied on *Report of the Ad Hoc Committee on the Establishment of a Permanent International Criminal Court* and Article 18 of the *International Law Commission Draft Code of Crimes against the Peace and Security of Mankind* which held that widespread and systematic were alternatives. The French version of the ICTR Statute required

i. Definition of widespread

The term '*large scale*', rather than widespread, was originally referred to in the 1996 Draft Code of Crimes against Peace and Security of Mankind.¹⁰⁰ A widespread attack is defined as an attack which is directed against a '*multiplicity of victims*'.¹⁰¹ It has also been defined as a '*massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims*'.¹⁰² Furthermore, the crime can be widespread due to the '*cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude*'.¹⁰³

that that the attack be both widespread and systematic; however, the ICTR held that this was an error of translation given that customary international law provides they are alternatives. The ICTR in *Akayesu* (n 9) did not identify what the customary international law was. However, the decision of the ICTY in *Tadić* (n 93) and Article 18 of the Draft code outlined above could have had a bearing on its decision. In determining whether an act is widespread or systematic the court will consider a number of factors including; the nature of the underlying offences and/or acts, the number of victims, the consequences of the attack directed against any civilian populations, patterns in the underlying offences and the participation of the authorities or officials. However, there has been debate that a reading of Article 7 (1) and 7 (2) (a) of the ICC Statute in tandem suggests that the attack must be both widespread and systematic. Schabas notes that this would have little impact in reality give that there is an overlap between as some of the same factors are relevant in considering whether an attack is widespread and or systematic. Notwithstanding this, case law of the ICC has held that widespread and systematic are alternatives. UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para 48 [Contains text of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991], 3 May 1993, S/25704, available at <http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf>; Prosecutor v. Dragan Nikolić aka "*Jenki*"; Case No. IT-94-2-R61; Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20th October 1995, para 26; *Tadić*, (n 93) [646]-[648]; *Akayesu* (n 9) [579] & Footnote 144 which states- '*In the original French version of the Statute, these requirements were worded cumulatively: "Dans le cadre d'une adieux generalise et systematic", thereby significantly increasing the threshold for application of this provision. Since Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation.*' This was confirmed in *Nahimana et al.*, Judgment ICTR Appeals Chamber (n 92) [919]-[920]; *Prosecutor v. Kunarac et al*, Case No. IT-96-23-T & IT-96-23/1-A, Appeal Judgment, 12 June 2002, [94] (*Kunarac Appeal Judgment*); *Duch* (n 92) [301]; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 149 quoting Professor Kai Mabus "*Verbrechenselemente*" sowie Verfahrens- und Beweisregeln des Internationalen Strafgerichtshofes (2001) 6 Neue Juristische Wochenschrift 405, pp. 406-407; *Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009 [82] (*Bemba*, Decision on Application for Leave to Appeal); *Katanga* (n 2) [394]-[395]

¹⁰⁰ Draft Code of Crimes against the Peace and Security of Mankind 1996 (n 50); Report of the International Law Commission on the work of its forty-eighth session 6 May–26 July 1996, 51 UN GAOR Supp. (No. 10), UN Doc. A/51/10, p. 94-95; Quoted in Bassiouni *International Criminal Law: Sources, Subjects and Contents* (3rd edn Brill, 2008) 471. See also Christa Rottensteiner, *The denial of humanitarian assistance as a crime under international law*, International Review of the Red Cross, No. 835, (30 September 1999) Available at <<http://www.icrc.org/eng/resources/documents/misc/57jq32.htm>> (last accessed 7th July 2018)

¹⁰¹ *Prosecutor v. Clément Kayishema et al.*, Case No. ICTR-95-I-T, Trial Judgment, 21 May 1999 [123]

¹⁰² *Akayesu* (n 9) [580]

¹⁰³ Yearbook of the International Law Commission 1996, Volume II, part 2, Report of the Commission to the

The term widespread is not defined by the ICC Statute; however, the ICC Pre-Trial Chamber in *Bemba* held that widespread referred to:

*‘[T]he large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims. It entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians. The underlying offences must also not be isolated.’*¹⁰⁴

The ICC Pre-Trial Chamber in *Katanga* went onto consider, in the context of a widespread attack, what the term ‘organisational policy’ meant in the context of Article 7 (2) (a) of the ICC Statute.¹⁰⁵ The court held an attack must be organised and follow a pattern, even where an attack is carried out over a large area or on a large civilian population. Furthermore, the attack ‘must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a territory or by any organisation with the capability to commit a wide spread or systematic attack against a civilian population. The policy need not be explicitly denied by the organisational group. Indeed, an attack which is planned, directed or organised - as opposed to spontaneous or isolated acts of violence - will satisfy this criterion.’¹⁰⁶

ii. Definition of systematic

Systematic refers to ‘organised nature of the acts of violence and the improbability of their random occurrence’.¹⁰⁷ The existence of a policy or plan is of evidentiary value however, it is not a separate legal requirement of a CAH.¹⁰⁸

Article 7 (2) (a) of the ICC Statute requires that for an attack to be systematic there must be a ‘multiplicity of victims’ under one of the CAH listed under Article 7(1) of the ICC Statute¹⁰⁹. The ICC Pre-Trial Chamber in *Katanga* went onto define systematic as a ‘plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission

General Assembly on the work of its forty-eight session,. 47 cited with approval in *Blagojević & Jokić* (n 92) [545], see footnote 1853; *Duch* (n 92) 300;

¹⁰⁴*Bemba* Decision on Application for Leave to Appeal (n 99) 83; *Katanga* (n 2) [394] Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 148

¹⁰⁵ *Katanga* (n 2) [395]-[396]

¹⁰⁶ *ibid*

¹⁰⁷ *Kunarac* (n 92) [429] Confirmed in *Kunarac Appeal Judgment* (n 99) 94 *Duch* (n 92), 300; *Prosecutor v. Fofana and Kondewa* Case No. SCSL-04-14-T, Trial Judgment, 2 August 2007 [112] (*Fofana and Kondewa*)

¹⁰⁸*Ibid*, *Fofana and Kondewa* [113], *Duch* [305] *Akayesu* (n 9) [580]; *Prosecutor v. Blaškić*; Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, 100;

¹⁰⁹ *Katanga* (n 2) [398]

of acts or as "patterns of crimes" such that the crimes constitute a "non-accidental repetition of similar criminal conduct on a regular basis."¹¹⁰

C. Directed against any civilian population¹¹¹

The ICC Pre-Trial Chamber in *Katanga* considered this element under the ICC Statute.¹¹² It noted that Article 7 (2) (a) of the ICC Statute provides that an '[a]ttack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.¹¹³

The term is also considered by the Elements of Crimes of the ICC, a document which assists 'the Court in the interpretation and application' of CAH¹¹⁴

The ICC Statute does not define the term 'any civilian population';¹¹⁵ The ICC Pre-Trial Chamber in *Katanga* considered the term held that 'article 7 of the Statute affords rights and protections to "any civilian population" regardless of their nationality, ethnicity or other distinguishing feature.'¹¹⁶

D. Discriminatory intent/motive¹¹⁷

¹¹⁰ Ibid, *Katanga* (n 2) [397]

¹¹¹ The ICTY have held that the use of the terms 'directed against' a civilian population refers to a situation where 'the civilian population is the primary object of the attack'. The use of the word 'any' civilian population includes circumstances where a State commits an act or crime against humanity upon their own people/population. A civilian population refers to a population which is 'predominately civilian' and it does not mean to refer to the entire population of a state. The term is therefore broad enough to include persons, who were combatants but who have laid down their arms or combatants that are wounded. It also includes a proportion of the population which are not civilians; namely ex-combatants which are not taking part in the conflict and persons who are wounded or in detention, however, a court will examine the number of soldiers and their status in determining if a population is 'predominantly civilian'. The term 'directed against any civilian population' prevents the prosecution of crimes against humanity on combatants.

Civilian population has been defined in accordance with the Commentary to the two Additional Protocols of 1977 to the Geneva Conventions of 1949, See *Katanga* (n 2) [421]- [423]; *Blagojević & Jokić* (n 92) [543]; *Prosecutor v. Blaškić*; Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, 115; *Fofana and Kondewa* (n 107) [117]; *Duch* (n 92) [305]; *Kunarac* (n 92) [424]

¹¹² *Katanga* (n 92) [392]

¹¹³ Ibid Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford University Press 2005) 156

¹¹⁴ International Criminal Court (ICC), Elements of Crimes, 2011,(ICC-PIDS-LT-03-002/11_Eng) Referred to in *Katanga* (n 92) [393]

¹¹⁵ *Katanga* (n 92) [399]

¹¹⁶ ibid

¹¹⁷ The question which arises here is whether the crimes against humanity required a discriminatory intent or motive i.e. was the crime based on religious, political or other grounds? The crime of persecution, by its nature, has a discriminatory motive. Article 3 of the Statute of the ICTR provides for a discriminatory intent such that a crime against humanity must be 'committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.' In *Akayesu* (n 9) [461]-[469] the ICTR confirmed that a crime against humanity under the ICTR Statute must have a discriminatory intent. Similarly, Article 5 of the Law on the establishment of the ECCC provides for a discriminatory intent based 'on national,

There was support for and against the inclusion of a discriminatory motive by the Preparatory Committee of the ICC; however, the concept was later disregarded.¹¹⁸ The ICC does not require a discriminatory motive, save in relation to the CAH of persecution.¹¹⁹

E. Nexus between a CAH and an armed conflict¹²⁰

Most of the delegation at the Rome Conference believed that CAH should not be linked to an armed conflict.¹²¹ This view was based upon the fact that CAH would otherwise be subsumed

political, ethnical, racial or religious grounds.' The need to have a discriminatory intent was considered by the ICTY in *Tadić* (n 930 [652]). At first the ICTY held that a discriminatory intent was required. On appeal the court provided that no such discriminatory intent was required nor was it required by the Statute of the ICTY. The court also accepted that '*a discriminatory intent is not required by customary international law for all crimes against humanity*'. Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2ed, Cambridge University Press 2010), 235; Simon Chesterman, '*An Altogether Different Order: Defining the Elements of Crimes Against Humanity*', 10 *Duke Journal of Comparative & International Law* 307-344 (2000), 311; Prosecutor v. *Akayesu* Case No. ICTR-96-4, Appeal Judgment (June 1, 2001). para 461-9 (*Akayesu Appeal Judgment*); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001 with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) available at http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf; The *Akayesu Appeal Judgment* states [464] "*In the opinion of the Appeals Chamber, except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all crimes against humanity. To that extent, the Appeals Chamber endorses the general conclusion and review contained in Tadić.*"

¹¹⁸ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), 157; Preparatory Committee 1996 Report, Vol [87]; Preparatory Committee Draft Statute [87]

¹¹⁹ Rome Statute, Article 7 (1) (h)

¹²⁰ By the time the ICTY Statute was adopted customary international law had removed the requirement that there be a nexus between crimes against humanity and a war or armed conflict in the former Yugoslavia since 1991. As discussed above, Article II (1) (c) of Control Council No. 10 made no reference to a link between the two. Subsequent documentation including the draft codes of 1996 had removed a link between an armed conflict and the prosecution of crimes against humanity. However, Article 5 of the ICTY Statute still required a link:- "*The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:*

The ICTY Statute therefore required that the prosecution of crimes against humanity should only be done where there was a nexus with an armed conflict. The ICTY in *Prosecutor v. Tadić* accepted that such a link was not a requirement in customary international law and rather it was creature of the ICTY statute:-

'It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.'

The Appeals Chamber in *Tadić* held that an armed conflict, '*is satisfied by proof that there was an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law.*' Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), 142-143; Darryl Robinson, "*Crimes against Humanity*" at the Rome Conference, *The American Journal of International Law*, Vol. 93, No. 1 (Jan. 1999) 43-57, 46; UN Doc. A/AV.24 9/CR.P.2/Add.3/Rev.1, 11-16; Antonio Cassese, *Definition Of Crimes And General Principles Of Criminal Law As Reflected In The International Tribunal's Jurisprudence* (Preparatory Committee, 1996) 22nd March 1996

¹²¹ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), 142-143; Darryl Robinson, "*Crimes against Humanity*" at the Rome Conference; *The American Journal of International Law*, Vol. 93, No. 1 (Jan. 1999) 43-57, 46; UN Doc. A/AV.24 9/CR.P.2/Add.3/Rev.1, ppg.11-16;

within war crimes, thus making them redundant.¹²² Also, international developments since the Nuremberg Trials, namely, Control Council Order No. 10, the work of the ILC, the jurisprudence of the ICTY and the ICTR and the Apartheid Convention all indicated that customary international law did not require a nexus to an armed conflict to permit the prosecution of CAH.¹²³ No such requirement was therefore included in the Rome Statute.

The ICTR¹²⁴, SCSL¹²⁵, the ECCC¹²⁶ and the ICC¹²⁷ do not require a link between the CAH and a war crime/armed conflict. There is no requirement in international law that a CAH should have a nexus to an armed conflict save where it is expressly stated by a court's statute. The ICTY Statute is one such exception where a nexus is required. The removal of this nexus in the Rome Statute illustrates how CAH have evolved since they were first prosecuted.

F. The acts of the perpetrator must form part of the attack¹²⁸

Under Article 7 (1) of the ICC Statute state that for a crime or act to be committed as part of an attack it must have been '*committed in furtherance of the widespread or systematic attack against the civilian population*'.¹²⁹

G. Knowledge of the attack¹³⁰

Antonio Cassese, *Definition Of Crimes And General Principles Of Criminal Law As Reflected In The International Tribunal's Jurisprudence* (Preparatory Committee, 1996) 22nd March 1996

¹²² Ibid

¹²³ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), 142-14; Darryl Robinson; "*Crimes Against Humanity*" at the Rome Conference; The American Journal of International Law, Vol. 93, No. 1 (Jan. 1999) 43-57, 46

¹²⁴ See the Statute of the ICTR (n 68)

¹²⁵ Statute of the Special Court of Sierra Leone (n 70)

¹²⁶ *Duch* (n 92) [291]-[292]

¹²⁷ Rome Statute

¹²⁸ There must be a link between the attack and the actions of the accused person. The ICTY in *Kunarac* (n 92) [418] held that a number of factors would be considered in determining whether there was a nexus between the actions of the accused and the attack, namely; '*i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part of the attack.*' An underlying offence or act cannot be random or isolated. Having regard to the circumstances which the offence occurred the act must not be so far removed such that it cannot reasonably form part of the attack. Therefore an act which took place before or after an armed attack directed against any civilian population could still form part of that attack if it is '*sufficiently connected*'. *Blagojević & Jokić* (n 92) [547]; *Kunarac* (n 92) [418]; *Kunarac Appeal Judgment* (n 99) [99]; See also *Tadić Appeal Judgment*, [248] *Fofana and Kondewa* (n 107)[120]; *Duch* (n 92) [318]

¹²⁹ *Katanga* (n 2) [400]

¹³⁰ In order for a person to be convicted of a crime against humanity he/she must have had knowledge of the attack on a civilian population and his/her acts formed part of that attack. The accused does not necessarily need to know all of the characteristics of the attack; however, he/she needs to have an understanding of the circumstances which the act took place in. The knowledge of the perpetrator will depend on the facts of each case. The ICTY refused to set out a list of elements which may be relevant to determining the knowledge of the accused as they would vary depending on the facts or circumstances. ICC Elements of Crimes, 5

Article 7(1) of the ICC Statute provides that the accused must have ‘*knowledge of the attack*’. Knowledge is defined by Article 30 (3) of the ICC Statute as ‘*awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.*’

The Elements of Crimes assists in determining what the Rome Statute means by the term ‘*knowledge of the attack*’. The *mens rea* of all of the CAH listed in Article 7 (1) of the ICC Statute requires that ‘*[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*’ However, this should ‘*not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.*’¹³¹

The ICC Pre-Trial Chamber in *Katanga* held that the ad hoc tribunals which have defined the knowledge requirement as providing that ‘*the perpetrator knew that there was an attack on a civilian population, and that his or her acts were a part of that attack*’.¹³²

The Pre-Trial Chamber went onto say that ‘*the perpetrator's awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused's position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred*’¹³³.

All of these elements must be satisfied in order to convict a person for a CAH. However, additional elements must be proved depending on what type of CAH is being prosecuted. It is now necessary to consider what other elements must be proved to successfully prosecute the CAH of an ‘*other inhumane act*’, under Article 7 (1) (h) of the Rome Statute.

¹³⁰ *Katanga* (n 2) [401]

¹³¹ ICC Elements of Crimes, 5

¹³² *Katanga* (n 2) [401]

¹³³ *Katanga* (n 2) [402]

IV. The elements of the CAH of an ‘*other inhumane act*’

An act can be defined as a CAH of an ‘*other inhumane act*’ once it first, satisfies the elements of a CAH, outlined above. Secondly, the act must satisfy the elements of an ‘*other inhumane act*’.¹³⁴

As we have seen in Part II above, the term ‘*other inhumane acts*’ stemmed from Article 6 (c) of the London Agreement and Article II(1)(c) in Control Council Order No. 10.¹³⁵ The importance of having a residual category of crimes was considered by the ILC in light of Article 18 of the Draft Code of Crimes:

*“The Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity”*¹³⁶

The prosecution of ‘*other inhumane acts*’, permitted the prosecution of CAH which met all of the elements of a CAH, but which were not defined as a separate and distinct CAH under that courts statute. However, ‘*other inhumane acts*’ could only be prosecuted if they were of a similar character or gravity to recognised CAH. The non-exhaustive nature of ‘*other inhumane acts*’ has raised concerns in relation to their vagueness, and thus raised questions as to whether the prosecution of ‘*other inhumane acts*’ breaches the principle of legality or *nullum crimen sine lege*. The prosecution of ‘*other inhumane acts*’, notwithstanding their potential vagueness, has been justified based on a broad interpretation of documents codifying international human rights law including the UDHR 1948.¹³⁷ Given the original link between CAH and armed conflict, it was understandable that courts focused on international humanitarian law to ascertain whether an act fell within the remit of ‘*other inhuman acts*’. As time has passed subsequent breaches of human rights have been prohibited and codified by international

¹³⁴ Champion, Lee, Hyde, Trumbull; ‘*Research Paper: Special Court for Sierra Leone - Forced marriage as an “other inhumane act”*’ (n 90) 8

¹³⁵ The Charter and Judgment of the Nurnberg Tribunal History and Analysis (Memorandum submitted by the Secretary-General) United Nations- General Assembly International Law Commission, Lake Success, New York 1949, 67 available at http://untreaty.un.org/ilc/documentation/english/a_cn4_5.pdf Telford Taylor

¹³⁶ Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, UNGAOR 51st Sess. Supp. No. 10 (A/51/10) (Crimes Against the Peace and Security of Mankind), at para. 17, p. 103; Quoted in *Prosecutor v. Kupreškić et al*, Case No. IT-95-16-T Trial Judgment, 14 January 2000 [565] footnote 828 (*Kupreškić Trial Judgment*)

¹³⁷ Ibid, *Kupreškić Trial Judgment* [566]

covenants and conventions including the ICCPR,¹³⁸ the ECHR,¹³⁹ the African Charter of Human Rights and Freedoms¹⁴⁰ and the Charter of Fundamental Rights of the European Union.¹⁴¹ As international criminal law and international human rights law have developed, more crimes have been recognised as falling under the residual category of ‘*other inhumane acts*’ as a CAH. For example the prosecution of additional ‘*inhumane acts*’, such as sexual violence was mentioned in the UN Security Council, Report of the Secretary-General which related to the Statute of the ICTY:¹⁴²

*“Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called “ethnic cleansing” and widespread and systematic rape and other forms of sexual assault, including enforced prostitution”.*¹⁴³

As already mentioned above sexual violence, forcible transfer, attempted murder, acts committed on corpses and forced marriage have all been deemed to amount to ‘*other inhumane acts*’ by the ad hoc tribunals.¹⁴⁴ Many of these crimes have been defined and listed as CAH under the Rome Statute, hence removing the need to prosecute them as ‘*other inhumane acts*’ by the ICC.

¹³⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171

¹³⁹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

¹⁴⁰ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

¹⁴¹ European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (OJ C 364/01)

¹⁴² Ibid, UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) [48] [Contains text of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991], 3 May 1993, S/25704, See (n 72) UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)

¹⁴³ Ibid

¹⁴⁴ UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (N 142) 8-9

a. Other inhumane acts & the ad hoc tribunals

The Statutes of the ad hoc tribunals provide for the prosecution of ‘*other inhumane acts*’ as a CAH.¹⁴⁵

In order for an act or omission to amount to an ‘*other inhumane act*’, three elements must be considered according to the decisions of the ad hoc tribunals:¹⁴⁶

- a) Was the act or omission of similar seriousness to the other CAH listed under the Statute of the court?
- b) Did the act or omission cause serious physical or mental suffering or injury or did it amount to a serious attack on human dignity?
- c) Was the act or omission done intentionally or does the accused have criminal responsibility for the person who committed the act or omission?¹⁴⁷

First, the court must consider whether the act is sufficiently similar in gravity to the other CAH. This requires an assessment of the facts of the case, the nature of the act and the context in which it occurred, the circumstances of the victim, his/her age and sex, the physical and moral effect the act had on the victim.¹⁴⁸

Secondly, the act must have caused serious mental or physical suffering to the victim or it amounted to a serious attack on the victim’s human dignity. In determining the harm regard must be had to all of the factual circumstances, including the age and sex of the victim, the nature of the act, the manner in which the offence occurred, the health of the victim including the physical, mental and moral effects on the victim as a result of the act.¹⁴⁹ The act itself does not have to cause long term suffering. It is sufficient if the act would have long term side effects.¹⁵⁰

¹⁴⁵ ICTY Statute, Article 5 (i) (n 72) ICTR Statute, Article 3 (i) (n 68); SCSL Statute, Article 2 (i) (n 70) Article 5 Law on the Establishment of the Extraordinary Chambers.

¹⁴⁶ *Prosecutor v. Mitar Vasiljević* (Trial Judgment), IT-98-32-T, Trial Judgment 29 November 2002 [235] (Mitar Vasiljević) *Blagojević and Jokić* (n 92) [626]; Taylor (n 2) [436]; Duch (n 92)[367]

¹⁴⁷ Ibid

¹⁴⁸ *Mitar Vasiljević* (n 146) [236] *Blagojević and Jokić* (n 92) [627]; *Duch* (n 92)[367]-[369]

¹⁴⁹ Gideon Boas, James L. Bischoff, Natalie Reid, *International Criminal Law Practitioners Library, Vol II: Elements of Crimes Under International Law* (Cambridge University Press 2008) 100

¹⁵⁰ *Kunarac* (n 92) [501]; *Blagojević and Jokić* (n 92) [627]; referring to *Mitar Vasiljević* (n 146) [235]; *Duch* (n 92)[368]-[369]

Thirdly, there must be a direct or indirect intention to inflict serious physical, mental suffering or an attack on a person's dignity.¹⁵¹

It is sufficient that '*the perpetrator knew that his act or omission was likely to cause such suffering to, or amount to a serious attack on, the human dignity of the victim(s) and, with that knowledge, acted or failed to act*'.¹⁵²

b. 'Other inhumane act' under Article 7 (1) k of the ICC Statute

The elements of a CAH of an '*other inhumane act*' under the Rome Statute are different to the test applied by the ICTY, ICTR, ECCC and SCSL as the ad hoc tribunals intended that '*other inhumane acts*' be a '*catch all provision*'.¹⁵³ Article 7 (1) (k) provides that a CAH includes '*other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health*'. The Rome Statute has limited the scope of an '*other inhumane act*' in relation '*to the action constituting an inhumane act and the consequence required as a result of that action*'.¹⁵⁴ The following elements must be provided in order for an act to amount to an '*other inhumane act*' under Article 7 (1) (k) of the Rome Statute.

i. 'Other inhumane act'

The Elements of Crime of the ICC set out specific criteria in determining whether a crime falls under an '*other inhumane act*'. In using the term '*other*', the Rome Statute prohibits an act being '*simultaneously considered*' as an '*other inhumane act*', if it would fall under another CAH listed under Article 7 (1) of the Rome Statute.¹⁵⁵

If an act satisfies the elements of another crime listed under Article 7 (1) of the Rome Statute then it will not fall under Article 7 (1) (k), an '*other inhumane act*'.

This element is of relevance to this thesis and to the legal characterisation of forced marriage under Article 7 of the Rome Statute. For example, the court in *Ongwen* held that evidence of forced labour and other CAH, which would fall under Article 7 (1) '*are all factors which*

¹⁵¹ Gideon Boas, James L. Bischoff, Natalie Reid; *International Criminal Law Practitioners Library, Vol II: Elements of Crimes Under International Law* (Cambridge University Press 2008), 102

¹⁵² *Blagojević and Jokić* (n 92) [628]; *Duch* (n 92) [371]

¹⁵³ Quoted *Katanga* (n 2) [450] at footnote 398 citing M. Boot. revised by C. K. Hall, *Article 7 - Crimes against Humanity* in Triffterer O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed., München, C.H.Beck, 2008) [79], 230

¹⁵⁴ *Katanga* (n 2) [450]

¹⁵⁵ *Katanga* (n 2) [452]

indicate a situation of “forced marriage”¹⁵⁶ This suggests that Article 7 (1) permits the prosecution of more than one CAH even if they are based on the same facts or they occur in one continuing event. The reason this is possible is because each crime has materially distinct elements. The CAH of sexual slavery has arguably different elements or harms to the CAH of forced marriage as an ‘*other inhumane act*’. Certainly, the circumstances surrounding each crime, offender and victim are different and therefore it is foreseeable that forced marriage might fall under the CAH of sexual slavery, while a case with different facts forced marriage could conceivably fall under the CAH of an ‘*other inhumane act*’. Regardless of the facts forced marriage can only be prosecuted as the CAH of an ‘*other inhumane act*’ if it is of a similar character to the other crimes listed under Article 7 (1).

ii. Similar gravity to other crimes listed under Article 7 (1) of the ICC Statute

The act must be of a similar character, namely of a similar gravity and nature to the other offences referred to under Article 7 (1) of the Rome Statute.¹⁵⁷

During the course of drafting the Rome Statute concerns were raised about whether the inclusion of ‘*other inhumane*’ acts might breach the principle of legality.¹⁵⁸ Lee comments that ‘*serious concerns*’ were raised ‘*because of its ambiguity*’.¹⁵⁹ Schabas notes that at the Rome Conference concerns were raised that ‘*other inhumane acts*’ was ‘*too vague*’ and it could might ‘*violate*’ the principle of the *nullum crime sine lege*.¹⁶⁰ During the course of the negotiations Mexico indicated that ‘*an exhaustive list*’ of other inhumane acts ‘*was required to satisfy the principle nullum crimen sine lege*’.¹⁶¹ Columbia,¹⁶² Sri Lanka,¹⁶³ Uruguay,¹⁶⁴ Sierra Leone¹⁶⁵ and Chile¹⁶⁶ expressed a similar view. The United States expressed similar

¹⁵⁶ Ongwen (n 4) [91]

¹⁵⁷ ICC Elements of Crime, 12, Footnote 30, which provides that ‘It is understood that “character” refers to the nature and gravity of the act.’ Quoted in Katanga (n 2) 451

understood as referring to the nature and gravity of the act; RUF Judgment (n 14) [2307]

¹⁵⁸ Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2016) 207

¹⁵⁹ Lee, *The International Criminal Court: the making of the Rome Statute: issues, negotiations* (Kluwer Law International 1999) 102

¹⁶⁰ Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2016) 207

¹⁶¹ UN Doc. A/CONF.183/C.1/SR.3 20 November 1998 125

¹⁶² UN Doc. A/CONF.183/C.1/SR.3 133

¹⁶³ UN Doc. A/CONF.183/C.1/SR.3 155

¹⁶⁴ UN Doc. A/CONF.183/C.1/SR.4, 22

¹⁶⁵ UN Doc. A/CONF.183/C.1/SR.4, 23

¹⁶⁶ UN Doc. A/CONF.183/C.1/SR.4, 27

concern indicating that any list relating to CAH generally speaking should be exhaustive.¹⁶⁷ Lee comments that an agreement was reached to include ‘*other inhumane acts*’ as a residual criminal against humanity by clarifying what was meant by the term, namely only crimes that were of a ‘*similar character*’ as the other CAH would fall under the definition.¹⁶⁸ In order to adhere to the principle of legality the ICC can only prosecute crimes as ‘*other inhumane acts*’ if it was a similar character to the CAH already listed.

In determining what was meant by the term ‘*similar gravity*’; the ICC Pre-Trial Chamber in *Katanga* considered the principle of *nullum crimen sine lege* concluding that:

*‘inhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute.’*¹⁶⁹

Forced marriage has been held in *Ongwen* to be of a similar gravity to the other CAH listed under Article 7 (1).¹⁷⁰ (See Chapter 1)

iii. The act must have caused serious injury to the body or to mental or physical health

The court must be satisfied that the act caused ‘*great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.*’¹⁷¹ In order to establish injury to the body the ICC Pre-Trial Chamber in *Katanga* quoted the conditions previously adopted by the ICTY in *Kordić and Jerez*, namely that:

‘(a) the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances;

(b) the suffering must be the result of an act or omission of the accused or his subordinate; and

¹⁶⁷ UN Doc. A/CONF.183/C.1/SR.3 20 November 1998 139

¹⁶⁸ Lee, *The International Criminal Court: the making of the Rome Statute: issues, negotiations* (Kluwer Law International 1999) 102

¹⁶⁹ *Katanga* (n 2) [448]; Schabas; *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010),184 See also *Prosecutor v Lubanga Dyilo* ICC-01/04-01/06 (Trial Chamber 1, 15th July 2011) [12] (*Lubanga*) *Veeher v. Estonia*, Application No. 45771/99, 21/01/2003 [31]

¹⁷⁰ *Ongwen* (n 4)

¹⁷¹ ICC Elements of Crimes, 2011 ICC-PIDS-LT-03-002/11_Eng, 12

*(c) when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.*¹⁷²

Forced marriage was deemed to cause serious harm in *Ongwen*.¹⁷³

iv. Knowledge

The accused must have been aware of the facts that established the act or CAH. Knowledge is defined pursuant to Article 30 of the ICC Statute, outlined above. Also, the Elements of Crimes provide that the *'[t]he perpetrator was aware of the factual circumstances that established the character of the act'* and *'[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.'*¹⁷⁴

Conclusion

The following elements must be proved in order for forced marriage is to fall under Article 7 (1) (k) of the Rome Statute, namely the CAH of an *'other inhumane act'*.

- A. The facts of the forced marriage must satisfy all of the elements of a CAH under Article 7(1) of the ICC Statute namely:
 - a. An attack;
 - b. Widespread or systematic;
 - c. Directed against any civilian population;
 - d. The acts of the perpetrator must form part of the attack;
- B. The facts of forced marriage must satisfy the criteria of an *'other inhumane act'* under Article 7 (1) (k) of the ICC Statute, namely,
 - a. Does forced marriage fall under another CAH listed under Article 7 (1) of the ICC Statute?
 - b. Is forced marriage of a similar gravity to the other CAH listed under Article 7 (1) of the ICC Statute?
 - c. Does forced marriage cause serious injury to the body or the mental or physical health of the victim?

¹⁷² *The Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004 [117] quoted in *Katanga* (n 2) [454]

¹⁷³ *Ongwen* (n 4)

¹⁷⁴ Elements of Crime, 12; *Katanga* (n 2) [455]

- d. Was the perpetrator aware of the facts which established the forced marriage?

As already stated, the author is of the view that forced marriage can amount to a CAH in principle. It will depend on the facts of each case whether the elements of forced marriage as an '*other inhumane act*' are satisfied. Furthermore, as discussed in Chapter 3, prosecutorial discretion can play a major role in how forced marriage is characterised under Article 7 (1) of the Rome Statute.

Chapter 3:

Prosecuting forced marriage: Prosecutorial discretion

Law, politics and policy can impact on how a CAH, such as forced marriage, is defined, charged, prosecuted and convicted at the ICC.¹ The ICC Prosecutor can choose to charge forced marriage as one CAH as opposed to another under Article 7 (1) of the Rome Statute.² The Pre-Trial Chamber and the Trial Chamber also have the power to modify how forced marriage is charged by the prosecutor at the Pre-Trial Hearing and the Trial Hearing under ICC Regulation 55.³ This Chapter will consider these factors as they can impact on the legal characterisation of forced marriage under Article 7 (1) of the Rome Statute.

I. Prosecutorial discretion

The prosecution of international crimes of a sexual or gendered nature have often been overlooked.⁴ Prosecutorial discretion has dictated what CAH have been prosecuted by international

¹ See De Vos, Christian and Kendall, Sara and Stahn, Carsten, eds *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015); Gallavin, Chris, *Prosecutorial discretion within the ICC: under Pressure of Justice*, Criminal Law Forum, 2006, Vol. 17 (1), 43-58; Davis, Cale; *Political Considerations in Prosecutorial Discretion at the International Criminal Court*, International Criminal Law Review, 2015, Vol. 15 (1), 170; De Souza Dias, Talita, *Interests of Justice: Defining the scope of prosecutorial discretion in Article 53 (1) (c) and (2) (c) of the Rome Statute of the International Court*, Leiden Journal of International Law, Vol 30 (3), 731-751 (Dias, *Interests of Justice: Defining the scope of prosecutorial discretion in Article 53 (1) (c) and (2) (c) of the Rome Statute of the International Court*); Badagard, Lovisa; Klamberg, Mark, *Gate Keepers of the ICC: Prosecutorial strategies for Selecting Situations and Cases at the International Criminal Court*, Georgetown Journal of International Law, 2017, Vol. 48 (3), 639 (95); Aptel, Cécile; 'Prosecutorial Discretion at the ICC and Victim's Right to Remedy: Narrowing the Impunity Gap', Journal of International Criminal Justice, Volume 10, Issue 5, 1 December 2012, 1357-1375 (Aptel, *Prosecutorial Discretion at the ICC and Victim's Rights to Remedy*); Moffett, Luke, *Justice Before the International Criminal Court* Routledge 2014 Bachvarova, Tatian, *The Standing of Victims in the Procedural Design of the ICC* (Brill 2017)

² Dias, *Interests of Justice: Defining the scope of prosecutorial discretion in Article 53 (1) (c) and (2) (c) of the Rome Statute of the International Court* (n1)

³ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 16 (Pre-Trial Chamber II, 15 June 2009) [203] (*Bemba*); Walther, Suzanne, *Cumulation of Offences*, Ch. 11.6 in Antonio Cassese, Paola Gaeta and John R.W.D. Jones *The Rome Statute of the International Criminal Court A Commentary* (Oxford University Press 2002); *Prosecutor v. Jean-Pierre Bemba Gombo* Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence (Women's Initiatives for Gender Justice) ICC-01/05-01/08 (Pre-Trial Chamber II, 13 July 2009)

⁴ Anne -Marie de Brouwer, Charlotte Ku, Renén Römken and Larissa van den Herik eds, *Sexual Violence as an International Crime: Interdisciplinary Approaches* eds. Intersentia (2013) Chapter by Linda Bianchi, *The Prosecution of Rape and Sexual Violence: Lessons Learned from Prosecutors at the ICTR* 130 (Linda Bianchi, *The Prosecution of Rape and Sexual Violence: Lessons Learned from Prosecutors at the ICTR in Sexual Violence as an International Crime*, 2013) Anne -Marie de Brouwer, Charlotte Ku, Renén Römken and Larissa van den Herik eds, *Sexual Violence as an International Crime: Interdisciplinary Approaches* eds. Intersentia (2013) Chapter by Anne -Marie de Brouwer, Charlotte Ku, Renén Römken and Larissa van den Herik, 'How to Move Forward? Interdisciplinary Approaches to Recognizing, Investigating and Prosecuting Sexual Violence as an International

tribunals.⁵ Ocampo recalls the decision by the Chief Prosecutor, Robert Jackson, in the Nuremberg Tribunal not to prosecute sexual crimes, notwithstanding, evidence available to him.⁶ Askin and De-Brouwer suggest sexual violence could have been prosecuted at Nuremberg, given the evidence before that court.⁷

Aptel outlines five components where a prosecutor can exercise their discretion which can impact on what CAH are prosecuted.⁸ A prosecutor must decide first what activity and secondly what individual is going to be prosecuted.⁹ Thirdly, a decision will be made with respect to the ‘*specific factual allegations*’ which are going to be prosecuted.¹⁰ This could have a bearing on whether facts or acts of a CAH of sexual slavery, enslavement or forced marriage (as an ‘*other inhumane act*’) might be included in the investigation. Fourthly, an investigator has discretion to decide the ‘*legal characterisation*’ of the charges, for example will the act and/or harm of forced marriage be prosecuted as a CAH of an ‘*other inhumane act*’ or will the facts be prosecuted as the CAH of sexual slavery or enslavement or could both be charged.¹¹ Fifthly and finally, the prosecutor can choose what witnesses will give evidence.¹² This prosecutorial discretion can impact on what victims get justice and arguably which victims can seek reparations. The last three are of particular relevance to this thesis, namely, the discretion of the prosecutor to choose the factual situation, the legal characterisation and what victims or witnesses will give evidence.

Crime,, 375 (Anne -Marie de Brouwer, Charlotte Ku, Renén Römken and Larissa van den Herik, *How to Move Forward? Interdisciplinary Approaches to Recognizing, Investigating and Prosecuting Sexual Violence as an International Crime in Sexual Violence as an International Crime*, 2013)

⁵ Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, (Dordrecht: Martinus Nijhoff Publishers 1997) 138-139

⁵ Anne-Marie L.M. de Brouwer, *Supernatural Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005) 7

⁶ Anne -Marie de Brouwer, Charlotte Ku, Renén Römken and Larissa van den Herik eds, *Sexual Violence as an International Crime: Interdisciplinary Approaches* eds. Intersentia (2013) Chapter by Luis Moreno-Ocampo, *The Place of Sexual Violence in the strategy of the ICC Prosecutor*, 152-153 (Ocampo, *The Place of Sexual Violence in the strategy of the ICC Prosecutor in Sexual Violence as an International Crime*, 2013)

⁷ Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Dordrecht: Martinus Nijhoff Publishers 1997) 138-139

⁷ Anne-Marie L.M. de Brouwer, *Supernatural Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005) 7

⁸ Aptel, *Prosecutorial Discretion at the ICC and Victim’s Rights to Remedy* (n 1) 1357-1375

⁹ *ibid*

¹⁰ Aptel, *Prosecutorial Discretion at the ICC and Victim’s Rights to Remedy* (n 1) 1357-1375

¹¹ *ibid*

¹² Aptel, *Prosecutorial Discretion at the ICC and Victim’s Rights to Remedy* (n 1) 1357-1375

a. Lessons learned from the use of prosecutorial discretion at the ICTR and the SCSL

Bianchi has recounted the challenges faced at the ICTR in prosecuting sexual violence as an international crime.¹³ This was caused in part, by the lack of precedents in prosecuting sexual violence.¹⁴ Also the political will to prosecute sexual violence at the ICTR ‘*varied over the years*’.¹⁵ The role of management at the ICTR was important to the prosecuting of sexual violence crimes as a clear strategy was needed on how to prosecute certain crimes and this had to be communicated to all staff. A sexual violence strategy should, according to Bianchi, be drafted at the start of process to ensure that it is integrated into both the prosecution and investigation strategy.¹⁶ Judge Doherty, an esteemed Judge at the SCSL, suggests that these principles were adopted by the SCSL prosecutor and it resulted in the first successful prosecution of forced marriage as a CAH in international law.¹⁷

The discretionary nature of the international criminal prosecutor was only put on a statutory footing at the SCSL whereby Article 1 (1) of the SCSL Statute limited the jurisdiction of that court to the prosecution of those individuals who ‘*bear the greatest responsibility for serious violations*’.¹⁸ The Statute of the SCSL is unique as it is the only statute of an international court or tribunal which requires that staff appointed by the SCSL prosecutor should be ‘*experienced in gender-related crimes and juvenile justice*’.¹⁹ The impact of this provision and the use of prosecutorial discretion at the SCSL is surmised by Binaifer Nowrojee in her work with the

¹³ Linda Bianchi, *The Prosecution of Rape and Sexual Violence: Lessons Learned from Prosecutors at the ICTR in Sexual Violence as an International Crime*, 2013 (n 4) 130

¹⁴ Ibid

¹⁵ Linda Bianchi, *The Prosecution of Rape and Sexual Violence: Lessons Learned from Prosecutors at the ICTR, in Sexual Violence as an International Crime: Interdisciplinary Approaches* eds. Anne -Marie de Brouwer, Charlotte Ku, Renén Römkens and Larissa van den Herik, Intersentia (2013), 130

¹⁶ Ibid

¹⁷ Anne -Marie de Brouwer, Charlotte Ku, Renén Römkens and Larissa van den Herik eds, *Sexual Violence as an International Crime: Interdisciplinary Approaches* eds. Intersentia (2013) Chapter by Teresa Doherty, *Jurisprudential I Developments Relating to Sexual Violence: The Legacy of the Special Court for Sierra Leone* 159-60 (Teresa Doherty, *Jurisprudential Developments Relating to Sexual Violence: The Legacy of the Special Court for Sierra Leone in Sexual Violence as an International Crime*, 2013)

¹⁸ UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002; Aptel, *Prosecutorial Discretion at the ICC and Victim’s Rights to Remedy* (n 1) 1357-1375; UN SC letter dated 22 Dec 2000 from the President of the Security Council addressed to the Secretary-Genera, UN Doc. S/2000/1234, 22 December 2000 [1] at 1

¹⁹ Statute providing for the Responsibilities of the Prosecutor, Article 15 (4); Teresa Doherty, *Jurisprudential Developments Relating to Sexual Violence: The Legacy of the Special Court for Sierra Leone in Sexual Violence as an International Crime* 2013 (n 17) 159

United Nations Research Institute for Social Development. She notes that despite few resources the SCSL prosecutor David Crane decided that justice would be sought for victims of sexual violence and it was.²⁰ This was achieved via the development and adoption of a prosecution strategy for sexual violence. With a staff of only 10 investigators two ‘*experienced female investigators were immediately dedicated to sexual assault investigations (20 per cent of the investigations team, as opposed to the ICTR, which has never dedicated more than 1–2 per cent of its investigative team of approximately 100 persons to this issue).* After only one year in existence, most of the indictments included sexual violence charges, before the court had even begun to hear the cases.’²¹ The investigations resulted in the prosecution at the SCSL of forced marriage as a CAH of an ‘*other inhumane act*’.

Nowrojee is critical that a choice of prosecutor can determine what charges of sexual nature are brought and this illustrates the need for courts to be mandated to prosecute crimes of a sexual nature to ensure they are properly investigated and prosecuted.²² Even where a court is mandated to prosecute crimes of a sexual nature, a prosecutor still has the discretion to prosecute CAH such as forced marriage.²³

b. The role of prosecutorial discretion in the prosecution of forced marriage at the ICC

The Preparatory Commission of the Rome Statute illustrated the importance of prosecutorial discretion in the prosecution of GBV at the ICC as ‘[t]he effective investigation, prosecution, and trial by the Court of sexual and gender violence crimes would not necessarily flow automatically from the inclusion of crimes of sexual and gender violence in the Statute.’²⁴

Based on lessons learned from the ICTR and SCSL there are arguably three elements which were important to the prosecution of the CAH of forced marriage at the ICC. First, there must

²⁰ Binaifer Nowrojee, *Your Justice is Too Slow: Will the OCTR Fail Rwanda’s Rape Victims*, United Nations Research Institute for Social Development, Occasional Paper 10 (November 2005) 11-12 Cited by Teresa Doherty, *Jurisprudential Developments Relating to Sexual Violence: The Legacy of the Special Court for Sierra Leone in Sexual Violence as an International Crime* 2013 (n 17) 159

²¹ *ibid*

²² Binaifer Nowrojee, *Your Justice is Too Slow: Will the OCTR Fail Rwanda’s Rape Victims*, United Nations Research Institute for Social Development, Occasional Paper 10 (November 2005) 11-12

²³ *ibid*

²⁴ C. Steains, ‘Gender Issues’, in R. S. Lee (ed.), *The International Criminal Court: The Making of The Rome Statute* (Martinus Nijhoff Publishers, 1999), 357 quoted in Yassin Brunger, *Investigations and Prosecutions of Sexual and Gender-based Crimes by the International Criminal Court*, Institute for Justice and Reconciliation Policy Brief Series No. 23 (March 2017) available at <http://ijr.org.za/home/wp-content/uploads/2012/07/IJR-Brief-No-23-08Mar115-WEB.pdf> (last accessed 29th June 2018)

be a ‘*prosecutorial mandate*’, to prosecute forced marriage as a CAH.²⁵ Secondly, a prosecutor must establish a mandate with respect to the prosecution of forced marriage at the outset i.e. a clear strategy how it will be characterised. Thirdly, gender parity is essential.

Despite the discussions in earlier chapters one may question whether the ICC prosecutor has a mandate to prosecute forced marriage under Article 7 (1) of the Rome Statute as it is not listed as a CAH under Article 7 (1) of the Rome Statute. However, there is a commitment in the Rome Statute to ‘*gender inclusive justice*’.²⁶ The ICC Prosecutor is required to conduct an effective investigation and prosecution which must, under Article 54 (1) ‘*take into account the nature of the crime, in particular where it involves sexual violence, gender-based violence and violence against children*’.²⁷ The ICC Prosecutor is also permitted to appoint special advisors on gender and children under Article 42 (9) of the Rome Statute. Special gender advisors to the ICC have included recognised gender experts, such as Professor Catherine MacKinnon, Brigid Inder, the former Executive Director of the WIGJ and the most recently appointed Patricia V. Sellers.²⁸ The OTP also established a Children and Gender Unit which has persons ‘*with legal and psycho-social expertise*’ to advise the Prosecutor.²⁹

The ICC Appeals Chamber has held that victims do not have a right to participate in the investigation and the Prosecutor is not ‘*explicitly required*’ under the Rome Statute to consider

²⁵ Linda Bianchi, *The Prosecution of Rape and Sexual Violence: Lessons Learned from Prosecutors at the ICTR in Sexual Violence as an International Crime*, 2013 (n 4) 130

²⁶ Binaifer Nowrojee, *Your Justice is Too Slow: Will the OCTR Fail Rwanda’s Rape Victims*, United Nations Research Institute for Social Development, Occasional Paper 10 (November 2005) 27; Luis Moreno-Ocampo, *The Place of Sexual Violence in the strategy of the ICC Prosecutor*, in *Sexual Violence as an International Crime: Interdisciplinary Approaches* edited by Anne -Marie de Brouwer, Charlotte Ku, Renén Römkens and Larissa van den Herik, (Intersentia 2013), 151

²⁷ Ocampo, *The Place of Sexual Violence in the strategy of the ICC Prosecutor in Sexual Violence as an International Crime* 2013 (n 6) 153; Yassin Brunger, *Investigations and Prosecutions of Sexual and Gender-based Crimes by the International Criminal Court*, Institute for Justice and Reconciliation Policy Brief Series No. 23 (March 2017) (n 24)

²⁸ <ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women’s Initiatives for Gender Justice, as Special Gender Advisor> Press Release : 21 August 2012 available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr833> (last accessed 7th July 2018) <The Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, appoints Patricia V. Sellers as her Special Adviser on Gender> Press Release : 19 December 2017 available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1352> (last accessed 7th July 2018)

²⁹ Fatou Bensouda, *The investigation and prosecution of sexual and gender-based crimes: reflections from the Office of the Prosecutor*, Keynote Address at The Hague Academy of International Law Advanced Course on International Criminal Law (24 August 2015), available at <https://www.hagueacademy.nl/wp-content/uploads/2015/03/Opening-keynote-speech-The-Hague-Academy-of-International-Law-Advanced-Course-on-International-Criminal-Law.pdf> (last accessed 29th June 2018) (Bensouda, *Keynote Address at the Hague Academy Of International Law*, 2015)

the rights of victims in deciding whether to prosecute a crime or not.³⁰ However, the Prosecutor's Strategy appears to suggest that it takes into account the views of victims when exercising its discretion.³¹ Ocampo is quoted as saying that '*[a]t every stage of the judicial process, the [ICC Prosecutors] Office will consult with the relevant victims and take their interests into account*'.³² If the Prosecutor considers the views and voices of the victims, then this may persuade him or her to prosecute forced marriage under Article 7 (1) of the Rome Statute.

The ICC Prosecutor can decide not to prosecute a case in the '*interests of justice*'.³³ Dias points out the '*ambiguity*' given the absence of a definition of '*interests of justice*'. In her view, '*interests of justice*' under Article 53 (1) (c) of the Rome Statute includes interests of victims, peace and security matters and non-prosecutorial measures; however, these factors must be balanced against the gravity of the crime and other possible circumstances weighing in favour of the initiation of an investigation.³⁴ Its relevance to this thesis is this: the ICC Prosecutor has the discretion to prosecute forced marriage under Article 7 (1) of the Rome Statute; however, he/she may deem it to be in the interests of justice not to prosecute forced marriage as a CAH or to choose a different legal characterisation under Article 7 (1).

Given an assessment of the materials to date, the author is of the view that the Rome Statute does not in any way prevent a prosecutor having the discretion to prosecute forced marriage as a CAH under Article 7 (1) of the Rome Statute.

i. Criticisms of Ocampo in his use of prosecutorial discretion at the ICC

Ocampo writing on the place of sexual violence in the strategy of the ICC prosecutor, would cause a reader to believe that he had full regard to the gendered nature of the acts and facts prosecuted in Lubanga as '*we presented the gender dimensions of the crime of enlisting and*

³⁰ Aptel, *Prosecutorial Discretion at the ICC and Victim's Rights to Remedy* (n 1) 1357-1375; Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber 1 of 7th December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber 1 of 24 December 2007, Situation in Democratic Republic of Congo (ICC-01/04-556), Appeals Chamber, 19 Dec 2008 [52]

³¹ OTP Strategy 2009-2012, 1 February 2010 [22]

³² Moreno-Ocampo, Prosecutor of the ICC, Eightieth Diplomatic Briefing (the Hague, 26th April 2010, 2. See De Vos, Christian and Kendall, Sara and Stahn, Carsten, eds (2015) *Contested Justice: The Politics and Practice of International Criminal Court Interventions*. Cambridge University Press

³³ Rome Statute, Article 53 (1) (c); Dias, *Interests of Justice: Defining the scope of prosecutorial discretion in Article 53 (1) (c) and (2) (c) of the Rome Statute of the International Court* (n1) 731-751

³⁴ Ibid

conscripting’ child soldiers.³⁵ As discussed in Chapter 1, the former ICC Prosecutor, missed an opportunity to prosecute GBV and forced marriage as a CAH in *Lubanga*. Ocampo speaking about *Lubanga* acknowledged that ‘[i]n the camps, girl soldiers, some aged 12 years old, were used as cooks and fighters, cleaners and spies, scouts and sexual slaves. One minute they would carry a gun, the next minute, they would serve meals to the commanders, the next minute, the commanders would rape them.’³⁶ He goes onto say that were also ‘kept as “wives” by the commanders.’³⁷ Ocampo also acknowledged ‘it is our responsibility to present the gender crimes suffered by the most vulnerable’.³⁸ However, in practice, as Prosecutor at the ICC, Ocampo failed to prosecute sexual violence in *Lubanga* and he was criticised for it.³⁹ It seems, in the view of the author, hypocritical for Ocampo to say, ‘[i]n the ICC, girls will not be invisible’, as he failed to adequately prosecute or to focus on GBV when he had the discretion and power to do so.⁴⁰

ii. The development of a prosecution strategy and policy for the investigation and prosecution of GBV at the ICC

Although critical of Ocampo the author accepts that the prosecutor often must choose what Aptel refers to as ‘representative’ cases to prosecute, thus following the precedent set at the

³⁵ Ocampo, *The Place of Sexual Violence in the strategy of the ICC Prosecutor in Sexual Violence as an International Crime*, 2013 (n 6) 153

³⁶ Ibid, 154

³⁷ Ocampo, *The Place of Sexual Violence in the strategy of the ICC Prosecutor in Sexual Violence as an International Crime* 2013 (n 6) 154

³⁸ Ocampo, *The Place of Sexual Violence in the strategy of the ICC Prosecutor in Sexual Violence as an International Crime* 2013 (n 6) 153

³⁹ Brigid Inder, *Letter from Women's Initiatives for Gender Justice to Mr. Luis Moreno Ocampo, Chief Prosecutor*, International Criminal Court (2006), http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf (last accessed 7 July 2018) (WIGJ Letter to Ocampo)

³⁹ Ibid See Kelly-Jo Bluen, *Gender(ed) perspectives: An analysis of the ‘gender perspective’ in the Office of the Prosecutor of the ICC’s Policy Paper on Sexual and Gender-based Crimes*, The Institute for Justice and Reconciliation Policy Brief No 26 2017, 3 available at <http://www.ijr.org.za/home/wp-content/uploads/2018/01/IJR-Brief-No-26-Final-web-12.02.pdf> (last accessed 7th July 2018) Separate and Dissenting Opinion of Judge Odio Benito in *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842; Katy Glassborow, *Call for Lubanga Charges to Cover Rape*, Institute for War and Peace Reporting, 12 May 2008. Available at <http://iwpr.net/report-news/call-lubangacharges-cover-rape> (last accessed 7th July 2018) Louise Chappell, *The Gender Injustice Cascade: ‘Transformative’ Reparations for Victims of Sexual and Gender-Based Crimes in the Lubanga Case at the International Criminal Court*, The International Journal of Human Rights 21, no. 9 (November 22, 2017): 1223–42; Amy Senier, *The ICC Appeals Chamber Judgment on the Legal Characterization of the Facts in Prosecutor v. Lubanga*, American Society of International Law Insights 14, 8, Jan. 2010 available <https://www.asil.org/insights/volume/14/issue/1/icc-appeals-chamber-judgment-legal-characterization-facts-prosecutor-v> (last accessed 30th June 2018) Lisa Gambone, *Failure to Charge: The ICC, Lubanga & Sexual Violence Crimes in the DRC*, Foreign Policy Association, (22 July 2009)

⁴⁰ Ocampo, *The Place of Sexual Violence in the strategy of the ICC Prosecutor in Sexual Violence as an International Crime* 2013 (n 6) 153

Nuremburg Trials.⁴¹ However, in the authors view his failure to prosecute GBV was because he did not establish a clear mandate to prosecute forced marriage; he did not create a strategy for its prosecution nor did he allocate the necessary resources for its investigation. The subsequent prosecution of forced marriage at the ICC, in the author's view, is based on the strategy and policies of the current prosecutor.⁴²

Key to the success of the prosecution of forced marriage as an '*other inhumane act*' at the ICC was the appointment in 2012 of Ms Fatou Bensouda as ICC Prosecutor.⁴³ Under her watch the OTP Strategic Objectives 2012-2015 included paying '*particular attention to sexual and gender based crimes and crimes against children*'.⁴⁴ These were expanded upon to '*continue to integrate a gender perspective in all areas of the Office's work and to pay particular attention to SGBC and crimes against and affecting children, in accordance with Office policies*'.⁴⁵ These objectives were developed in the 2014 publication of a OTP Policy Paper on the Policy Paper on Sexual and Gender-Based Crimes, the first policy paper of its kind in international law.⁴⁶ Wherein Bensouda acknowledged the challenges faced in prosecuting sexual and GBV but reiterated the commitment of her office to the prosecution of these crimes.⁴⁷ The OTP also produced a Policy Paper on Case Selection and Prioritisation and one on Children.⁴⁸ The OTP Policy Paper on Children explicitly states that OTP may consider prosecuting forced marriage as a CAH under Article 7 (1) (k) of the Rome Statute: '*[a]nother type of sexual and gender-based crimes that the Office may prosecute is forced marriage as an "other inhumane act", a CAH under article 7(1)(k)*'.⁴⁹ The OTP Policy on Children illustrates that the ICC has a clear mandate to prosecute forced marriage as an '*other inhumane act*' under Article 7 (1) (k) of the Rome Statute.

⁴¹ Aptel, *Prosecutorial Discretion at the ICC and Victim's Rights to Remedy* (n 1) 1357-1375; H. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 JICJ (2005) 145

⁴² Kelly-Jo Bluen, *Gender(ed) perspectives: An analysis of the 'gender perspective' in the Office of the Prosecutor of the ICC's Policy Paper on Sexual and Gender-based Crimes*, The Institute for Justice and Reconciliation Policy Brief No 26 2017

⁴³ Bensouda, *Keynote Address at the Hague Academy Of International Law*, 2015 (n 29)

⁴⁴ OTP Strategic Plan 2012-2015, 11th October 2013

⁴⁵ OTP Strategic Plan 2016-2018, 16th November 2015

⁴⁶ OTP, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014 Bensouda, *Keynote Address at the Hague Academy Of International Law*, 2015 (n 29) 5

⁴⁷ OTP Policy Paper on Sexual and Gender-Based Crimes, June 2014 [2] 5)

⁴⁸ OTP Policy Paper on Case Selection and Prioritisation, ICC-OTP, September 2016; OTP Policy on Children, ICC-OTP, November 2016,

⁴⁹ OTP Policy on Children, November 2016, 24, footnote 67

The ICC, under Bensouda, has adopted the three elements identified by Bianchi which are essential to the prosecution of GBV i.e. rape, sexual slavery and forced marriage. Most importantly, Bensouda has showed leadership in the prosecution of *Ongwen* for the CAH of forced marriage as an '*other inhumane act*'.

Bensouda has confirmed her willingness to prosecute several acts based on the same facts, where evidence supports the prosecutions.⁵⁰ Forced marriage as a CAH of an '*other inhumane act*' can fall within the context of enslavement or sexual slavery and therefore, it appears that in principle the OTP will, if the evidence supports it, prosecute the CAH of forced marriage as an '*other inhumane act*' and the CAH of sexual slavery.⁵¹ On the 27th of March 2018, the ICC issued an arrest warrant for *Al Hassan*.⁵² *Al Hassan's* is charged with forced marriage under the CAH of an '*other inhumane act*'. We await the confirmation of charges hearing to ascertain whether these charges will proceed any further and so the author is limited in that respect to the details of the charge.⁵³ Bensouda's statement after the recent arrest explained that '*Al Hassan is allegedly responsible for the crimes against humanity of persecution on both religious and gender grounds; rape and sexual slavery committed in the context of forced marriages*'.⁵⁴ Forced marriage is being prosecuted as the CAH of an '*other inhumane act*' notwithstanding that rape and sexual slavery were committed in the context of forced marriage. It remains to be seen whether there will be any legal challenge by the defence based on the principle of legality.

This is the second time the ICC has issued charges for forced marriage as an '*other inhumane act*'. In the authors view, this is indicative of the ICC Prosecutors preference to prosecute forced marriage as a CAH of an '*other inhumane act*' under Article 7 (1) (k) of the Rome Statute. This is in keeping with the strategic objectives of the OTP, the OTP Policy Paper on Sexual and Gender-Based Crimes and their Policy Paper on Children.⁵⁵

The nature of prosecutorial discretion is such that it changes with the prosecutor. The *Taylor* judgment at the SCSL illustrates how a different prosecutor may characterise forced marriage

⁵⁰ Bensouda, *Keynote Address at the Hague Academy Of International Law*, 2015 (n 29)

⁵¹ *Ongwen* (n 4) [92]

⁵² *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* ICC-01/12-01/18, 27th March 2018, Women's Initiative for Gender Justice, Statement on the Surrender of Al Hassan to the ICC and Charges of Forced Marriage: The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 3rd April 2018 available at <https://www.4genderjustice.org/pub/Statement-on-the-Surrender-of-Al-Hassan-to-the-ICC.pdf>

⁵³ <https://www.icc-cpi.int/Pages/item.aspx?name=pr1377>

⁵⁴ *ibid*

⁵⁵ <https://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx> and The ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014 19/20 (n 47)

differently. For the moment it appears that the OTP may prosecute forced marriage as a CAH of an *'other inhumane act'* although that may change with time.

II. Regulation 55 of the Regulation of the Court ⁵⁶

One may assume that a court is obliged to consider only the charges before it. This is not the case. Regulation 55 of the Regulation of the Court (ICC) permits the court to *'change the legal characterisation of facts to accord with the crimes'*.

Under Regulation 55 the ICC Pre-Trial Chamber and Trial Chamber can amend the charges for an offence other than the one which he/she was prosecuted. It is permitted by the Trial Chamber *'at any time during trial'* but only where the new characterisation does not extend beyond the circumstances and facts originally charged and confirmed by the Pre-Trial Chamber.⁵⁷ The parties must be able to make submissions on the suggested re-characterisation and the defence must be given *'adequate time and facilities for the effective preparation of his or her defence'*.⁵⁸

However, as we have seen in *Lubanga*, even where there is sufficient evidence to re-characterise a crime, the ICC may be unable to do so.⁵⁹ As outlined in Chapter 1, the legal representatives of the victims in *Lubanga* applied to the court to re-characterise the charges to include, among others, the CAH of sexual slavery.⁶⁰ The Trial Chamber concluded that the legal characterisation of the facts could be re-characterised. The Appeal Chamber over turned this decision holding that Regulation 55 (2) and (3) cannot be *'used to exceed the facts and*

⁵⁶ Regulations of the Court ICC-BD/01-02-07 Bemba (n 3)

⁵⁷ Ibid; Regulation 55 (1) and (2); Regulation 55 and the Rights of the Accused at the International Criminal Court, War Crimes Research Office, American University Washington College of Law, October 2013 available at <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-17-regulation-55-and-the-rights-of-the-accused-at-the-international-criminal-court/> last accessed 30th June 2018 (Regulation 55 and the Rights of the Accused at the International Criminal Court, American University Washington College of Law)

⁵⁸ Ibid,

⁵⁹ Regulation 55 and the Rights of the Accused at the International Criminal Court, American University Washington College of Law (n 57); Merope, Sienna, *Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC*, Criminal Law Forum; Sep 2011, Vol. 22 Issue 3 311-346, 36; Amy Senier, *The ICC Appeals Chamber Judgment on the Legal Characterization of the Facts in Prosecutor v. Lubanga*, American Society of International Law Insights 14, 8. Jan. 2010 available <https://www.asil.org/insights/volume/14/issue/1/icc-appeals-chamber-judgment-legal-characterization-facts-prosecutor-v> (last accessed 30th June 2018)

⁶⁰ Chappell, *'The gender injustice cascade: 'transformative' reparations for victims of sexual and gender-based crimes in the Lubanga case at the International Criminal Court'*, The International Journal of Human Rights, 21:9, 1223-1242, 1229; *Prosecutor v Lubanga*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-1891, 22 May 2009; Sienna Merope, *Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC*, Criminal Law Forum 22, no. 3 (2011): 311-46.

circumstances described in the charges or any amendment thereto'.⁶¹ According to the Appeal Chamber the re-characterisation went beyond the facts and circumstances already described in the charges confirmed by the Pre-Trial Chamber. The decision re-affirmed the discretionary power which the Prosecutor has in deciding which charges to prosecute. It illustrates the power which they hold to determine the terms of the investigation and the necessity for a prosecutorial mandate to determine what types of crimes should be investigated and prosecuted.

The Pre-Trial Chamber can re-characterise the charges presented to it by the Prosecutor at the Confirmation of Charges Hearing. At *Bemba*'s confirmation of charges hearing the ICC's Pre-Trial Chamber II held that rape and torture as a CAH cannot both be prosecuted if both crimes are based on the same facts.⁶² This could have implications for the prosecution of the CAH of forced marriage as an '*other inhumane act*' as rape, sexual violence, enslavement, forced labour can, according to *Ongwen*, be conducted in the context of forced marriage.⁶³ The ICC Pre-Trial Chamber in *Bemba* distinguished itself from the decisions of the ad hoc tribunals in the manner it interpreted the term '*additional material element*' within the CAH charges of rape and torture. The reasoning for this distinction; Regulation 55⁶⁴ of the ICC, which enabled the Pre-Trial Chamber to '*re-characterise a crime to give it the most appropriate legal characterisation*'.⁶⁵ While a prosecutor may prosecute forced marriage as a CAH of an '*other inhumane act*', the Pre-Trial Chamber has the power to re-characterise the crime.

Even if forced marriage is prosecuted as a CAH under Article 7 (1) (k) of the Rome Statute the court can change its legal characterisation and subsume it into another CAH under Article 7 (1) of the Rome Statute.

Conclusion

The power of the ICC prosecutor to choose the factual situation, the legal characterisation and what victims or witnesses that will give evidence all have a bearing on whether forced marriage can be prosecuted under Article 7 (1) of the Rome Statute. This prosecutorial discretion is illustrated by the failure of the courts first prosecutor to implement a clear strategy with respect

⁶¹ *Prosecutor v. Lubanga* Judgment on the appeal of Lubanga and the Prosecutor against the Decision of the Trial Chamber I of 14th July 2009 ICC-01/04-01/06 OA 15 OA 16, 8th December 2009 [1]

⁶² *Bemba* (n 3)

⁶³ *Ongwen* (n 4) [92]

⁶⁴ *Ibid Bemba* (n 3) [203]

⁶⁵ *Bemba* (n 3) [203]; Beth Van Schaack, *The Principle of Legality in International Criminal Law - Proceedings of the Annual Meeting*, American Society of International Law), Vol. 103 (March 25-28, 2009), 101-104, 103

to the prosecution of GBV. A factor which impacted on the lack of prosecutions for GBV at the ICC during Ocampo's term.

The current OTP Strategies and Policies are very clear that the court '*may*' prosecute forced marriage as a CAH of an '*other inhumane act*'. Therefore, forced marriage can be prosecuted as a CAH under Article 7 (1) of the Rome Statute. However, one must always be mindful of the ability of the Pre-Trial Chamber and the Trial Chamber to confirm or re-characterise forced marriage under Article 7 (1) of the Rome Statute.

Conclusion

This thesis examined whether forced marriage can fall under a CAH listed under Article 7 (1) of the Rome Statute. Given an assessment of the work of the Preparatory Commission and the decisions by the Pre-Trial Chamber in *Katanga*, *Ongwen* and the charges brought in *Al Hassan*, the author believes that forced marriage can fall under Article 7 (1) of the Rome Statute. A consideration of the role of prosecutorial discretion at the ICC illustrates that the characterisation of forced marriage may depend on who is the ICC Prosecutor. Currently, the strategic plan and the policies at the ICC indicate that there is a preference to prosecute forced marriage as a CAH of an ‘*other inhumane act*’. However, as was the case at the SCSL, this could change with a different prosecutor in place. Moreover, it remains to be seen whether there will be a conviction in *Ongwen* and if the Pre-Trial Chamber will confirm the charge of forced marriage as a CAH of an ‘*other inhumane act*’ in *Al Hassan*. These decisions will enable the author to determine more readily the legal characterisation of forced marriage under Article 7 (1) of the Rome Statute. However, the author envisages that forced marriage will continue to be prosecuted, for the moment, as a CAH of an ‘*other inhumane act*’ under Article 7 (1) of the Rome Statute.

Antonio Cassese once wrote that if international criminal justice can be administered it will ‘*send a message to the victims of appalling crimes that humanity will not turn its back on them.*’¹ Recognising CAH, such as forced marriage “*signifies that significant mass violations of human rights do not belong any longer in the sphere of domestic law. The international community is now legally entitled to intervene in such cases*”.² The introduction to this thesis considered the aims of the ICC and referred to the impact prosecuting forced marriage can have on ending impunity for forced marriage. It asked whether different definitions of forced marriage or different elements of forced marriage in ICL could impact on the deterrent effect of prosecuting forced marriage at the ICC.³ The prosecution of forced marriage as a CAH under Article 7 (1) is essential to meet the objectives of the ICC to ‘*deter*’ further atrocities.⁴ Barbara

¹ First Annual Report of the ICTY, UN Doc A/49/342 (UN SC: UN Doc. S/1994/1007) 29 August 1994, para 18 at 12-13; quoted by Aptel, Cécile; ‘Prosecutorial Discretion at the ICC and Victim’s Right to Remedy: Narrowing the Impunity Gap’, *Journal of International Criminal Justice*, Volume 10, Issue 5, 1 December 2012 pg. 1357

² Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, (Dordrecht: Martinus Nijhoff Publishers 1997), 138 citing B.V.A. Röling ; Antonio Cassese , *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Polity Press , Cambridge 1994, 56

³ Larissa van den Herik and Carsten Stahn ‘*The Diversification and Fragmentation of International Criminal Law*’, (Brill 2012) 35-37

⁴ Preamble Rome Statute

Bedont, who was involved in negotiations at the ICC, explains that it is important to recognise a crime or act for what it is as ‘*it is insufficient to subsume sexual violence under torture or assault. This hides the sexual aspect of the crime and denies the particular harm suffered by a victim of rape.*’⁵ A similar argument has been put forward for forced marriage, such that it should not be prosecuted or subsumed into the CAH of sexual slavery or enslavement.⁶ Rather, forced marriage should be prosecuted as the CAH of an ‘*other inhumane act*’ as this legal characterisation represents the actual harm suffered by the victim.⁷ According to the ICC Pre-Trial Chamber in *Ongwen* forced marriage differs from the crime of sexual slavery in three ways, the conduct, the harm and the interests that need to be protected.⁸ In other words, forced marriage has materially distinct elements not contained in the CAH of sexual slavery or enslavement. On this basis it should be prosecuted as a CAH of an ‘*other inhumane act*’.

There are elements which concern the author with respect to a legal characterisation of forced marriage as a CAH of an ‘*other inhumane act*’. The author believes that there may be a risk that an offender could be prosecuted for the same act twice, as it may be unclear where one crime started and another one ended. Furthermore, the author wonders whether the elements of forced marriage are in fact a work of judicial activism and that forced marriage more appropriately falls under the CAH of enslavement and sexual slavery. The court in *Ongwen* stated that forced marriage as the CAH of an ‘*other inhumane act*’ ‘*differs*’ ‘*notably from the crime of sexual slavery, in terms of conduct, ensuing harm, and protected interests*’.⁹ The court then commented that forced marriage will usually occur where a victim is subject to sexual slavery or enslavement.¹⁰ Other factors ‘*such as restrictions on the freedom of movement, repeated sexual abuse, forced pregnancy, or forced labour, in particular the forced performance of domestic duties, are all factors which indicate a situation of “forced*

⁵Barbara Bedont, *Gender Specific Provisions in the Statute of the International Criminal Court*, in 1 *Essays on the Rome Statute of the International Criminal Court (1999)* Flavia Lattanzi & William Schabas at 183; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 16 (Pre-Trial Chamber II, 15 June 2009, [31]-[33]; *The Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, 7 March 2014, ICC-01/04-01/07-3436-tENG (“Katanga Trial Judgment”) [1694]- [1696]; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment pursuant to Article 74 of the Statute”, 21 March 2016, ICC-01/05-01/08-3343 [743]-[751]

⁶ *Prosecutor v Ongwen*; Pre-Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15, 23rd March 2016 [92]

⁷ *ibid* [94]

⁸ *Ongwen* (n 6) [92]

⁹ *ibid*

¹⁰ *Ongwen* (n 6) [92]

marriage”’.¹¹ *Al Hassan* is also facing charges for sexual slavery committed during forced marriage.¹² If sexual slavery indicates a situation of forced marriage, when does one CAH start and the other end? Are they both part of one continuing act? Can both forced marriage and enslavement be prosecuted as a CAH under Article 7 (1) if both CAH are based on the same facts? ¹³ The answer to the last question, based on *Ongwen* and *Al Hassen* appears to be yes, both forced marriage and sexual slavery can be prosecuted as a CAH based on the same act, one under the CAH of an ‘*other inhumane act*’, the other as a CAH of enslavement or sexual slavery. The reason, they both have materially distinct elements not contained in each other. A defence team may challenge this based on the principle of legality, such that no one should be charged or convicted twice for the same offence. The author acknowledges that each set of facts where forced marriage or sexual slavery takes place are different. It is conceivable that some acts of forced marriage, may not have all the materially distinct elements required to be prosecuted as a CAH ‘*other inhumane act*’ and therefore it may be more appropriate for it to be prosecuted as a CAH of enslavement or sexual slavery. There were legitimate reasons why the WCGJ and leading academics have submitted that forced marriage should fall under the CAH of enslavement or sexual slavery. Arguably, forced marriage amounts to a deprivation of liberty. Deprivation of liberty falls under the CAH of enslavement and sexual slavery. Also, the author queries whether there may have been some judicial activism in defining forced marriage in such a manner that it has materially distinct elements not contained in the CAH of enslavement or sexual slavery. The author wonders whether a victim of sexual slavery or enslavement suffers a similar stigma to a victim of forced marriage. *Ongwen* held that a relationship of exclusivity is an element in the CAH of forced marriage as an ‘*other inhumane act*’. However, exclusivity is also mentioned as a factor in determining whether the CAH of marriage sexual slavery and enslavement took place. ¹⁴ In light of the assessment of the documentation before the Preparatory Commission, it is the author view that some of the drafters of the Rome Statute intended that forced marriage would fall under the CAH of enslavement and/or sexual slavery. However, this view is made with the caveat that there was no legal definition of forced marriage available to Preparatory Commission. Had there been,

¹¹ *Ongwen* (n 6) [92]

¹² *Statement of ICC Prosecutor*, Fatou Bensouda, following the arrest and transfer of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, a suspect in the Mali situation: ‘*We remain steadfast in the pursuit of our mandate under the Rome Statute*’

¹³ *Ibid*

¹⁴ *Prosecutor v. Kunarac et al.*, Case No. IT-96-23T & IT-96-23/1-T, Judgment, (Feb. 22, 2001); Jennifer Gong-Gershowitz, *Forced Marriage: A "New" Crime Against Humanity?* 8 Nw. J. Hum Rts 53 (2009) 68

the drafters of the Rome Statute may have considered including forced marriage as a CAH under Article 7 (1).

The author has one final observation with respect to the CAH of forced marriage and it may warrant further research. This thesis has shown that crimes which fell under the residual category of the CAH of an '*other inhumane act*', have over time become CAH. The legal characterisation of forced marriage as a CAH still remains uncertain and the fragmentation of ICL certainly illustrates that it may take years for its characterisation to be definite, if it ever reaches such a status. However, bearing this in mind, it is still conceivable that should another ad hoc tribunal or another type of court need to be established then it may list forced marriage as a CAH. Moreover, there is always the possibility, though unlikely, that the Rome Statute could be amended to include forced marriage as a CAH under Article 7 (1). In the meantime, the author awaits the *Ongwen* Trial's conclusion and the confirmation of charges hearing in *Al Hassen* to determine the characterisation of forced marriage under Article 7 (1) of the Rome Statute. Based on the current legal definition of forced marriage, the author confirms the view of the OTP that forced marriage may fall under the CAH of an '*other inhumane act*' under Article 7 (1) (k) of the Rome Statute.

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