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DEVELOPMENTS IN THE PROSECUTION OF GENDER-BASED CRIMES—THE SPECIAL COURT FOR SIERRA LEONE EXPERIENCE

REMARKS BY HON. TERESA DOHERTY,
JUSTICE OF THE SPECIAL COURT OF SIERRA LEONE*

The Special Court for Sierra Leone was set up following a request by the Government of Sierra Leone to the United Nations after a civil war that raged in that small West African country for ten years.¹ The war was noted for the brutality of the atrocities visited upon civilians, killing by beating and burning, the deliberate chopping off of arms, hands, and legs, the abduction of people for forced labor, as sex slaves, and as child soldiers, pregnant women cut open to settle bets about the sex of their babies, and the deliberate destruction of homes, villages, and cities.²

The Special Court for Sierra Leone is noted for several landmark decisions in International Law, including the decision on the immunity of a

* The views in this paper are entirely those of the writer and do not necessarily reflect the views of the Special Court for Sierra Leone or Trial Chamber II. Hon Justice T.A. Doherty, C.B.E., is from Northern Ireland. Before studying law in Belfast, she worked as a civil servant and as a volunteer in Zambia, and worked in legal aid clinics in “no go areas” of Belfast as a student in early 1970. She worked in Papua New Guinea from 1976-1987, first in the Public Solicitor’s (public defense) office and as provincial legal officer for Morobe Province. While Provincial legal officer she continued to do legal aid work and made several Constitutional rights challenges in the courts. She was the first woman to be elected as a councilor of the Papua New Guinea Law Society. She was appointed as the Principal Magistrate for the Momase region of Papua New Guinea in 1987 and as National and later Supreme Court judge in 1988, the first woman to hold any high judicial office in the South Pacific Islands Region. She was appointed a judge of the High Court and Court of Appeal of Sierra Leone in 2003. She was appointed by United Nations in Jan 2005 as a judge of the Special Court of Sierra Leone and is the presiding judge of Trial Chamber II. She is a commissioner for Life Sentence Review Commission for Northern Ireland, part time chairman of Appeal Services, member of the Commonwealth Reference Group for the promotion of the Rights of Women and the Girl Child and has worked on consultancies in various countries in Africa and Asia.

1. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 1, Jan. 16, 2002, 2178 U.N.T.S. 138 [hereinafter Agreement on the Establishment of a Special Court for Sierra Leone].

2. See *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-2004-16-A, Appeals Judgment (Feb. 22, 2008); *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-2004-16-T, Trial Chamber Judgment, (June 20, 2007).

Head of State,³ on the application of amnesties in peace treaties to crimes against humanity and war crimes,⁴ and the recruitment and use of children in war (commonly referred to as child soldiers).⁵ My emphasis in this Paper will be on the decisions relating to sexual slavery and forced marriage.

The Statute⁶ setting up the Court was charged to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law since November 30, 1996. The Statute provided that the court would have power to prosecute crimes against humanity and, for the first time, sexual slavery was specified as a crime against humanity at Article 2(g).⁷ As a hybrid court, the Statute of the court also incorporated domestic law of Sierra Leone. This included, *inter alia*, offences relating to the abuse of girls pursuant to the Prevention of Cruelty to Children Act 1926 (CAP.31). No persons were charged under this Sierra Leonean Law.

THE INDICTMENTS

A total of thirteen indictments were proffered against thirteen men and of these the indictments against the nine individuals associated, variously, with the Civil Defence Force, Armed Forces Revolutionary Council, and Revolutionary United Front were presented at the same time. These were later consolidated into three cases and were commonly referred to as the CDF, the ARFC, and the RUF trials. The AFRC indictees, Brima, Kamara, and Kanu, were arraigned on various dates, prior to the consolidation, between March and September 2003.

The initial charges brought by the Prosecution against the individuals who were later to be tried in the AFRC and RUF cases included allegations of sexual violence. In contrast, the Prosecution included no charges of sexual violence whatsoever in its initial indictments against the three individuals who would later be tried together in the CDF case. I do not know the reasons for this.

In February 2004, the Prosecution sought leave to amend its Indictments to, *inter alia*, “add one more and new count of forced marriage,” a crime against humanity in all three consolidated cases. Two of the indictments already included charges of sexual violence while one, the CDF, did not. In seeking to add the forced marriage charges to the two cases that already

3. See *Prosecutor v. Taylor*, Case No. SCSL-03-01-I-059, Decision on Immunity from Jurisdiction (May 31, 2004).

4. See *Prosecutor v. Kondewa*, Case No. SCSL-04-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (May 25, 2004).

5. *Prosecutor v. Norman*, Case No. SCSL-04-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (May 31, 2004).

6. Statute of the Special Court of Sierra Leone, *app. of Agreement on the Establishment of a Special Court of Sierra Leone*, *supra* note 1, 2178 U.N.T.S. at 145.

7. Statute of the Special Court, *supra* note 6, art. 1.

included other allegations of sexual violence, the Prosecution argued that the additional charge they were seeking to enter—forced marriage—was based on the “exact same factual context” pleaded in earlier indictments and therefore that the Defence would not need to undertake further investigations to contest this new count in the indictment. The Defence objected arguing forced marriage was not a crime against humanity and such a charge violated the principles of legality.⁸ After a lengthy review of the principles, in particular “the crucial consideration” of “timing and whether the application for the amendment is brought at the stage in the proceedings where it would not prejudice the rights of the accused,” the Trial Chamber by a majority allowed the Prosecution to amend its indictments in the two cases, the Armed Forces Revolutionary Council and the Revolutionary United Front, to include charges of forced marriage. The Trial Chamber also held that forced marriage was a “kindred offence” to those that existed in consolidated indictment⁹ and referred to “the necessity for international criminal justice to highlight the high profile nature of the emerging domain of gender offences with a view to bringing the alleged perpetrators to justice.”¹⁰

In its decision in the Civil Defense Forces case, the majority of the Trial Chamber considered the impact of adding an entirely new set of charges, involving a completely new set of facts, on the rights of the accused to be tried without undue delay and held that allowing the Prosecution to add new facts and counts at such a late date would have delayed the start of trial.¹¹

In his minority opinion, Justice Boutet referred to the Special Court’s own Rules, the reluctance of victims of sexual violence to come forward and report such actions, the reports of the International Committee of the Red Cross, the Special Rapporteur on the situation of the systematic rape, sexual slavery, and slavery—like practices during periods of armed conflicts and the rulings of the other ad hoc Tribunals in support of his opinion that leave to amend the indictment should be granted.¹²

It appears that the Trial Chamber in the recent case of *Prosecutor v. Lukić* at the International Criminal Tribunal for the Former Yugoslavia, when asked to amend an indictment to add new charges of rape, enslavement and torture was faced with a similar dilemma to that of the judges in the CDF case.¹³

8. *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶¶ 6, 12, 88 (May 6, 2004).

9. *Id.* ¶¶ 46, 52.

10. *Id.* ¶ 34.

11. *Prosecutor v. Norman, Fofana & Kondewa*, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment (May 20, 2004).

12. *See Prosecutor v. Norman, Fofana, & Kondewa*, Case No. SCSL-04-14-T, Dissenting Opinion of Judge Pierre Boutet on the Decision on Prosecution Request for Leave to Amend the Indictment, ¶¶ 26-34 (May 31, 2004).

13. *See Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-PT, Decision on Motion Seeking Leave to Amend the Second Amended Indictment (July 8, 2008).

Balancing the rights of the various parties is a discretionary matter, and, possibly other chambers may have lent more weight to the Prosecution's explanations for the delays in bringing charges of sexual violence in the CDF trial. However, the rights of the accused to a trial without undue delay is clearly articulated in the Special Court Statute as well as numerous human rights instruments that preceded it. In my view the sexual nature of the new charges had nothing to do with the CDF and *Lukić* trial decisions to deny the Prosecution applications to amend the impugned indictments, the same principles would have applied equally to any criminal charge.

THE DECISIONS

Trial Chamber II, of which I was a judge, heard and ruled on the evidence in *Prosecutor v. Brima, Kamara & Kanu* (the AFRC trial). That decision considered, for the first time, the international criminal law relating to child soldiers, forced marriage and sexual slavery. For the purposes of this paper I look at forced marriage and sexual slavery.

FORCED MARRIAGE

In the course of the civil war two rebel groups, the Revolutionary United Front and the Armed Forced Revolutionary Council regularly abducted civilians and used them for forced labor such as mining, domestic work, and carrying of loads, and women and girls for sexual purposes.

Those women and girls who were forcefully abducted from their homes were taken back to the rebel camps and fighters could select those women and girls they wanted as wives. Commanders got the first choice. Very young girls were sometimes allocated to young SBU (small boy unit) fighters. A bureaucratic system of registering the names and allocation of these women was instituted in some camps and fighters were obliged to sign for the women or girls allocated to them as wives. The captors sometimes kept those women or girls they captured themselves. The woman was told she was the wife of the captor or fighter. She was given no choice in the matter.

Both the Prosecution and Defense adduced expert evidence. The expert evidence by both parties showed that customary arranged marriage was and still is, a common phenomena in the rural areas throughout West Africa; less so in the urban areas. Girls were and are frequently married or had marriages arranged when they were quite young and got little say in who they would marry. Whilst the Muslim religion (the majority religious group in Sierra Leone) did not allow for women being married without their consent, it was apparent from the expert evidence that many girls were and are obliged for the good of the clan or the community to conform with the choice made by their elders. There was consent, albeit a reluctant consent or one that was made for the good of the community, rather than for the good of the individual. The vital element is the consent of the families of the prospective spouses.

The majority of the Trial Chamber in the AFRC trial, having heard the

evidence decided that the facts were not a basis for a separate crime of “so called forced marriage” but that it was subsumed into the crime of sexual slavery. Sexual slavery is a separate crime provided for in Article 2(g) of the Statute of the Special Court as a Crime against Humanity.

I dissented from the majority view. The evidence showed that women and girls who were made into wives had a conjugal status forced upon them. They were immediately stigmatized as “bush wives” or “rebel wives” they were considered “tainted” by “rebel blood” and were refused re-entry into their village communities or their family homes. Their children were stigmatized and, as one expert described it, were running naked without an education or future. The women were obliged to care for and carry the “husband’s” possessions, clean, cook and be loyal, and provide sex when and as the “husband” wanted. They had children and often suffered miscarriages; diseases and HIV/Aids were common. Any transgressions were severely punished and a “husband” who tired of his wife could replace her and might send her to the front line as a fighter. However, being a wife of a fighter brought with it certain protections. The wife was protected from rape by other men, given food when food was available and depending on the status of the “husband” had a corresponding status; to the extent that evidence showed that some wives of commanders were responsible for the distribution of looted goods.

The label “wife” to a rebel caused mental trauma, stigmatized the victims and negatively impacted on their ability to re-integrate into the communities.

In approaching the evidence and the submissions of the parties I looked to the international customary law and internationally recognized norms and standards because, as stated by Professor Werle:

As part of the international order, international criminal law originated from the same legal sources as international law. These include international treaties, customary international law, and general principles of law recognized by the world’s major legal systems. Decisions of international courts and international legal doctrine can be used not as sources of law, but subsidiary means for determining the law. Decisions of national courts which apply international law can also be referred to here.¹⁴

This led to taking account of the Penal Laws of other countries in Islamic, Christian, Hindu, Common Law, and Civil Law systems. However, more importantly the International Treaties and Conventions were applied; in particular the International Covenants such as the International Covenant on Civil and Political Rights and the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW) which Sierra Leone signed on September 21, 1988 and ratified in November 1988.

However, it was also relevant in the circumstances and facts of the case

14. GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 44-45 (2005).

to look particularly at the African Charters and Conventions such as the African (Banjul) Charter on Human and People's Rights and the protocols to the African Charter on the Rights of Women in Africa both of which had been signed (but not implemented by Sierra Leone). On the basis of those conventions and on the evidence, I held that

international treaties and domestic law provide that a marriage is a relationship founded on the mutual consent of both spouses. In forced marriage the consent of the victim is absent. In the absence of such consent, the victim is forced into a relationship of a conjugal nature with the perpetrator thereby subsuming the victim's will and undermining the victim's exercise of their rights to self determination.

Further that forced marriage did not necessarily involve elements of physical violence such as abduction, enslavement or rape and the fact that many women accepted their lot and remained with their "husbands" because they had no other choice did not transform a forced marriage into a consensual situation and did not retro-actively negate the original criminality of the act.

The Prosecution appealed the Majority Decision and the Appeal Chamber reviewed the evidence and the majority and minority opinions. The Appeal Chamber noted that "the Prosecution may have misled the Trial Chamber by the manner in which forced marriage appeared to have been classified in the Indictment. The Indictment classifies Count 8 "Other Inhumane Acts" along with Counts 6, 7, and 9 under the heading "Sexual Violence." This categorization of forced marriages explains, but does not justify, the classification by the Trial Chamber of forced marriage as "sexual violence."

After reviewing the history of "other inhumane acts" in International Criminal Law first introduced in the Nuremburg Charter, the Appeal Chamber held that the category "other inhumane acts" was intended to be a residual provision so as to punish criminal acts not specifically recognized as crimes against humanity but which, in context, are of comparable gravity to the listed crimes against humanity."

After considering the evidence and the law, the Appeal Chamber held that the perpetrator intended to impose a forced conjugal association rather than exercise mere ownership over civilian women and girls. They adopted the view in the dissenting opinion that forced marriage involves "the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victims." And

[v]ictims were subjected to mental trauma by being labelled as rebel "wives"; further they were stigmatised and found it difficult to integrate into their communities . . . causing mental and moral suffering, which in the context of the Sierra Leone conflict, is of comparable seriousness to other crimes against humanity listed in the Statute.¹⁵

¹⁵ Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-2004-16-A, Appeals Judgment, ¶ 193 (Feb. 22, 2008).

The Appeal Chamber then considered whether forced marriage satisfies the elements of “other inhumane acts” and held that other inhumane acts contained in Article 2(i) of the Statute forms part of Customary International Law:

serves as a residual category designed to punish acts or omissions not specifically listed as crimes against humanity provided these acts or omissions meet the following requirements:

Inflict great suffering, or serious injury to body or to mental or physical health;

Are sufficiently similar in gravity to the acts referred to in Article 2(a) to Article 2(h) of the Statute; and

The perpetrator was aware of the factual circumstances that established the character of the gravity of the act.

The acts must also satisfy the general chapeau requirements of crimes against humanity.

The Appeal Chamber stated that it was “firmly of the view that acts of forced marriage were of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence.”

SEXUAL SLAVERY

Statute Article 2(g) empowers the Special Court to prosecute persons who committed the crime of sexual slavery as part of a widespread or systematic attack against any civilian population. The crime of sexual slavery was described in the International Criminal Tribunal for the former Yugoslavia in the *Kunarac* case. The Statute of International Criminal Court, Art 7 (1)g-2, defined the crime of sexual slavery as:

The perpetrator exercised any or all of the powers attaching to the right ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

The perpetrator committed such conduct intending to engage in the act of sexual slavery or in the reasonable knowledge that it was likely to occur.

We adopted that definition and held:

The powers of ownership listed in the first element of sexual slavery are non-exhaustive. There is no requirement for any payment or exchange in order to establish the exercise of ownership. Deprivation of liberty may include extracting forced labour or otherwise reducing a person to servile status. Further, ownership, as indicated by possession, does not require confinement to a particular place but may include situations in which those who are captured remain in the control of their captors because they have nowhere else to go and fear for their lives. The consent or free will of the victim is absent under conditions of

enslavement.¹⁶

The facts showed that the women and girls forcefully abducted from their homes and communities by rebels were taken back to the rebel bases and forcefully marched from one base to another as the rebels moved through Sierra Leone. Some of the women and girls were sent for training in military tactics and fighting and sent to the front line, some as described, were forced into marriage and may not have been obliged to fight. Those women and girls who were not “wives” were available to all and any fighter as sexual objects. They were frequently raped and frequently gang-raped, they had no right to resist and could not escape.

They were obliged to perform domestic duties including cooking, laundering, and food finding. Food finding involved looting food from villages and farms as well as looking for food in the bush. Resistance or attempts to escape were met with severe punishment and, particularly in cases of attempted escape, with death.

Evidence was adduced of women being locked in rice boxes, wooden boxes used for storing food, and/or being lashed. The descriptions of the forced marches when women were pregnant, sick, and in one case giving birth to triplets, showed very severe maltreatment as part of the slavery and sexual slavery of these women.

All three of the Accused in the AFRC trial were convicted of sexual slavery, however, not as originally indicted. Count 7 of the Indictment which charged the defendants with “sexual slavery and other forms of sexual violence” was dismissed by the majority of the Trial Chamber as offending the Rule against duplicity. The majority ruled that “Count 7 is bad for duplicity and is accordingly dismissed in its entirety.”

I disagreed with the majority in this procedural ruling and held for reasons detailed in the judgment that part of the Count which charged the defendants with “other forms of sexual violence” should have been severed and the evidence relating to sexual slavery only considered.

The appeal by the Prosecution against the majority ruling was upheld by the Appeals Chamber which held the Count should have been severed.

In a May 11, 2007 article, Louise Arbour, then the United Nations High Commissioner for Human Rights, when writing about the plight of the victims of sexual attacks during conflicts stated that:

The Special Court for Sierra Leone has made strides in addressing such hindrances in the face of a monumental task; as the result of ten years of conflict and the belligerents’ methods of warfare in that country, the brutality of sexual violence was extraordinary, and its victims were to be counted in the thousands.¹⁷

16. Prosecutor v. Brima, Kamaru & Kanu, Case No. SCSL-04-16-T, Judgment, ¶ 709 (June 20, 2007).

17 Louise Arbour, *War Crimes Against Women Go on with Impunity*, TORONTO STAR, May 11, 2007, at A15.