UTRECHT JOURNAL OF
INTERNATIONAL AND EUROPEAN LAW

Victoria May Kerr, 'Should Forced Marriages be Categorised as 'Sexual Slavery' or 'Other Inhumane Acts' in International Criminal Law?' (2020) 35(1) Utrecht Journal of International and European Law pp. 1–19. DOI: https://doi.org/10.5334/ujiel.473

RESEARCH ARTICLE

Should Forced Marriages be Categorised as 'Sexual Slavery' or 'Other Inhumane Acts' in International Criminal Law?

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Gender-based crimes occur to this day in armed conflicts across the globe. Forced marriages were rife in Sierra Leone, Cambodia, and Uganda, and a debate has emerged as to how they should be categorised in international criminal law (ICL). The main question this paper examines is: should forced marriages be categorised as 'sexual slavery' or 'other inhumane acts' in ICL? The principle of *nullum crimen sine lege* (the NCSL principle), is used as a tool by which judgments from international criminal tribunals and the ICC can be objectively assessed. Judges have generally held that it is more appropriate, in line with the NCSL principle, to categorise forced marriages as 'other inhumane acts'. However, the paper finds that they are relying on authorities which are competent in an international human rights law (IHRL) context, but are not directly transferrable to ICL. The paper illuminates the broader debate between certainty and development in ICL and demonstrates how the tribunals and the ICC have attempted to strike a balance in cases involving forced marriages. It seeks to provide a solution which ensures that perpetrators of forced marriages in armed conflict are convicted and justice is served and respects both certainty and IHRL.

Keywords: Sexual slavery; Other inhumane acts; Principle of legality; International Criminal Law; Forced marriage; Gender-based crimes; International Criminal Court; Crimes against Humanity

I. Introduction

Gender-based crimes occur to this day in armed conflicts across the globe. Thousands of women and girls have been, and continue to be, victims of gender-based crimes carried out as weapons or tactics of war, or due to the fact they were, or are, viewed as prizes of victory.[1] For a time, gender-based crimes were considered as the 'forgotten' crimes of international law,[2] as victims were 'misunderstood and marginalized not only by their local communities, but also by the international criminal legal system'.[3] However, the *ad hoc* international criminal tribunals and the International Criminal Court (ICC) in recent years have taken leaps in showing their commitment to prosecuting such atrocities: prime examples being convictions for forced marriages at the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the ICC.[4]

Forced marriages were rife in the conflicts in Sierra Leone, Cambodia, and Uganda, and a 'sharp debate' has emerged as to how they should be categorised as a crime against humanity in international criminal

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[1] Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts*, (Martinus Nijhoff Publishers, 2012), p. 90.

[2] Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, (Oxford University Press, 2009), p. 76.

[3] Frances Nguyen, *Untangling Sex, Marriage, and Other Criminalities in Forced Marriage*, Goettingen Journal of International Criminal Law, (2014), Volume 6, No. 1, p. 44.

[4] See, for example, *Prosecutor v Alex Tamba Brima et al.*, SCSL-2004-16-T, Trial Chamber Judgment, 20 June 2007, Partly Dissenting Opinion of Justice Doherty on Count 7- sexual slavery, and Count 8 -'forced marriage'; *Prosecutor v Alex Tamba Brima et al.*, SCSL-2004-16-A, Appeals Chamber Judgment, 22 February 2008; *Closing Order, Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan*, Case File No. 002/19-09-2007-ECCC-OCIJ, OCIJ 15 September 2010; *Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-T, Trial Judgment, 18 May 2012, *Prosecutor v Dominic Ongwen*, Decision on the confirmation of charges, ICC-02/04-01/15, 23 March 2016.

law (ICL).[5] The judgments of the SCSL, ECCC and ICC concerning forced marriages reflect the contrasting viewpoints on the matter. Some argue that forced marriages most accurately share the characteristics of the crime of 'sexual slavery', whereas others are of the view that forced marriages are 'multilayered' acts,[6] which comprise both sexual and non-sexual elements, and subject victims to repeated physical, mental, and sexual abuse over a period of time,[7] and, therefore, are better categorised under the crime 'other inhumane acts'. Forced marriages are, to this day, not codified in the statutes of any international criminal tribunals, or the ICC as an independent crime.

A. Outline, Method and Approach

The main research question this paper examines is: should forced marriages be categorised as 'sexual slavery' or 'other inhumane acts' in ICL? The principle of *nullum crimen sine lege* (the 'NCSL principle'), a well-established legal concept, is used here as a tool by which key judgments from international criminal tribunals and the ICC, which have indeed categorised forced marriages as either being subsumed in 'sexual slavery' or as coming under 'other inhumane acts', can be objectively assessed. In the analysis, each of the four corollary principles of the NCSL principle are considered separately (see Section 4). While it may be an obvious finding that the international criminal tribunals and the ICC have generally held that it is more appropriate, in line with the NCSL principle, to categorise forced marriages as 'other inhumane acts' due to the fact that forced marriages are widely recognised as more than just sexual crimes, the reasoning in coming to these decisions, may be flawed. The judges may be relying on authorities which are competent in an international human rights law (IHRL) context, but are not necessarily directly transferrable to an ICL context (see Section 5).

The paper picks up on the broader debate between creating certainty and permitting development in ICL and demonstrates how the tribunals and the ICC have attempted to strike a balance in the cases involving forced marriages. Ultimately, it seeks to answer the research question by offering a solution which takes account of both sides of the debate. It provides a simplified solution which will ensure that going forward perpetrators of forced marriages in armed conflict are convicted and justice is served whilst respecting certainty (and compliance with the NCSL principle) and IHRL.

II. The Role of the NCSL Principle in ICL

The NCSL principle, often also referred to as the principle of legality, is a 'fundamental guarantee' and 'an essential element of the rule of law'.[8–9] It is recognised by both civil and common law systems, and was introduced on an international level after World War II.[10] Whilst it is incorporated in numerous key human rights conventions,[11] in ICL, the NCSL principle is *only* expressly provided for in Article 22 of the Rome Statute, and thus this provision has been regarded as 'unprecedented'.[12] Article 22 reads:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

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[5] Ibid, p. 20.

[6] Ibid, p. 37.

[7] Ibid, p. 25.

[8] Alexander Grabert, *Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change*, (Herbert Utz Verlag, June 2015), p. 10.

[9] Beth van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, The Georgetown Law Journal, (2008) Volume 97, p. 122.

[10] Alexander Grabert, *Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change*, (Herbert Utz Verlag, June 2015), p. 10.

[11] International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, Art. 15; European Convention on Human Rights, (1955) 213 UNTS 221, ETS 5, Art. 7; American Convention on Human Rights (1979), 1144 UNTS 123, OASTS 36, Art. 9; Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810, Art. 11(2); African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 Rev. 5, Art. 7(2); Geneva Convention Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135, Art. 99; Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3, Art. 2(c); Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 609, Art. 6(c).

[12] Claus Kreß, *'The International Criminal Court as a Turning Point in the History of International Criminal Justice'*, in Antonio Cassese, (ed.), *The Oxford Companion to International Criminal Justice*, (Oxford University Press, 2009) pp. 143–159, at p. 145.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.[13]

However, the NCSL principle is recognised as customary international law,[14] is a general principle of law under Article 38(1)(c) of the ICJ Statute,[15] and has also been regarded by some as a norm of *ius cogens*.[16]

The NCSL principle ensures that the prosecution of a defendant is based on specific and clear legal provisions that existed at the time the crime was committed,[17] to create legal certainty, predictability and foreseeability.[18] It incorporates four corollary principles: the principle of written law (*nullum crimen sine lege scripta* (NCSLS principle)); the principle of non-retroactivity (*nullum crimen sine lege praevia* (NCSLP principle)); the principle of specificity or certainty (*nullum crimen sine lege certa* (NCSLC principle)); and the prohibition of analogy (*nullum crimen sine lege stricta* (NCSLSt principle)).[19] It has been said that '[t]hese articulations of the principle are closely interconnected and reinforce each other' and that they are applicable in relation to definitions of criminal offences, the modes of liability, and defences.[20]

The NCSLS principle is self-explanatory – a crime may only be defined by the law itself. The NCSLP principle essentially prohibits the law from being applied retrospectively: the act in question must already exist in law.[21] Under the NCSLC principle, the law should be clear and precise and should detail both the objective and subjective elements of the crime.[22] Finally, the NCSLSt principle dictates that rules must be strictly construed and not extended by analogy,[23] and should therefore be considered as a 'restraint on interpretation'.[24] It has been said that the NCSLS and NCSLP principles allow the accused the right to rely on codified law which was valid at the time the act was committed.[25] Furthermore, the NCSLC and NCSLSt principles imply that ambiguities should be interpreted in favour of the accused.[26] In general, the NCSL principle 'protects the individual from arbitrary prosecution, conviction or punishment', 'limits the powers of the unelected judiciary in favour of legislative organs and provides for fairness within criminal proceedings'.[27]

The inclusion of the certain yet inflexible NCSL principle in the ICC Statute and therefore ICL could be regarded as a hurdle to judicial evolution. ICL provisions are not 'static' as they are subject to judicial interpretation, and will inevitably develop and expand over time.[28] Judicial creativity in interpretation may, however, lead to a conflict with the NCSL principle. If judges interpret the law beyond its original wording, or if criminal provisions are retroactively given meanings which were not originally intended, the NCSLSt principle or the NCSLP principle may be violated respectively.[29] Thus, as Alexander Grabert articulates, in ICL, the NCSL principle 'imposes on criminal judges a duty of interpretative restraint and significantly limits the scope for dynamic interpretation to the detriment of an accused'.[30] Whilst the principle should be 'the crucial guidepost in the interpretative process', international criminal tribunals and the ICC are often presented

[13] Rome Statute of the International Criminal Court (2002) 2187 UNTS 90, Art. 22.

[14] Alexander Grabert, *Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change*, (Herbert Utz Verlag, June 2015), p. 11.

[15] Ibid.

[16] Ibid.

[17] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford University Press, 2010), p. 407.

[18] ICRC, Advisory Service on International Humanitarian Law, General Principles of International Criminal Law, (March 2014), <https://www.icrc.org/eng/assets/files/2014/general-principles-of-criminal-icrc-eng.pdf> accessed 27 August 2018.

[19] Ibid.

[20] Alexander Grabert, *Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change*, (Herbert Utz Verlag, June 2015), p. 11.

[21] ICRC, Advisory Service on International Humanitarian Law, General Principles of International Criminal Law, (March 2014), <https://www.icrc.org/eng/assets/files/2014/general-principles-of-criminal-icrc-eng.pdf> accessed 27 August 2018.

[22] Antonio Cassese, *Cassese's International Criminal Law*, 3rd Edition, (Oxford University Press, April 2013), para 2.4.1.

[23] Beth van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, The Georgetown Law Journal, (2008) Volume 97, p. 121.

[24] Nicholas Azadi Goodfellow, *The Miscategorization of 'Forced Marriage' as a Crime against Humanity by the Special Court for Sierra Leone*, International Criminal Law Review (2011), Vol. 11, p. 847.

[25] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, (Intersentia 2002), p. 365.

[26] Ibid.

[27] Alexander Grabert, *Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change*, (Herbert Utz Verlag, June 2015), p. 11.

[28] Ibid, p. 13.

[29] Ibid, pp. 11–12.

[30] Ibid, p. 13.

with new situations which do not fall under the existing law, and therefore 'a certain degree of dynamism is required in order to cope with minor alterations'.[31] New characteristics of armed conflicts and emerging recognition of certain types of conduct by the international community are continuous challenges to the already existing international criminal law rules.[32] Indeed, it is clear that flexibility is key for any criminal justice system to work.[33]

ICL judges are tasked with maintaining the certainty of the law by ensuring compliance with the NCSL principle whilst also allowing the law to develop, and achieving both simultaneously, is not simple. The overlap between ICL, IHRL and international humanitarian law (IHL) is poignant yet potentially problematic. It appears that all three fields aim to protect the rights and dignity of individual, however it could be argued that ICL steps in when IHRL and IHL cannot be enforced due to State failures or inadequacy, and the requirement of the existence of an armed conflict. The creation of the international criminal tribunals and the ICC allow for cases to be lead against individuals on serious violations of ICL and IHL, which, in turn, both include IHRL norms. This does not require reliance on the existence or co-operation of the State to secure protection for the individual.

Key developments in IHRL have greatly influenced ICL. As Antonio Cassese points out, ICL '*derives its origin from* and continuously *draws upon* [...] *human rights law*'.[34] The fact that these two disciplines of law are intertwined leads to the question as to what extent international criminal tribunals and the ICC should take into account such developments when interpreting ICL. The Rome Statute, for example, states that the application and interpretation of ICL must be consistent with internationally recognised human rights,[35] and *ad hoc* tribunals have sought clarification from IHRL when it comes to determining the definition of and the scope of crimes due to the overlaps between the fields of law. However, some argue that whilst public opinion may favour certain violations of human rights being prosecuted, not 'every human rights violation constitutes a crime universally recognized as warranting criminal proceedings before an international tribunal'.[36] Furthermore, it has been argued that although the scope of IHRL is broad, the 'liberal approaches to interpretation' often used in the fields of IHRL 'cannot be sweepingly adopted for the purposes of ICL', but may be used in certain appropriate instances.[37] Too much emphasis on aligning ICL with IHRL may undermine the certainty and stability of criminal law, and thus judges must seek to strike a balance in this regard.

The NCSL principle is therefore an analytical tool by which the categorisation of forced marriages under the crime of 'sexual slavery' by the SCSL or 'other inhumane acts' by the SCSL, the ECCC and ICC can be assessed, as such analysis reveals whether there is sufficient certainty and whether the rule of law is being upheld in this respect. It is, firstly, however, important to provide a factual background to, and understand the nature of the forced marriages which occurred in the conflicts of Sierra Leone, Cambodia, and Uganda, and which form the basis of the cases at the tribunals and the ICC analysed in Section 4.

III. Forced Marriages in the Conflicts in Sierra Leone, Cambodia and Uganda: Background

A. Sierra Leone

The eleven-year civil war in Sierra Leone is renowned for its 'extreme brutality and widespread human rights abuses against civilians'.[38] In 1991, the Revolutionary United Front (RUF), an armed opposition group attacked villages along the eastern Sierra Leone-Liberia border in an attempt to overthrow the government. The attacks continued throughout the 1990s, and in 1997 the RUF were invited to join the government by Major Johnny Paul Koroma, who had overthrown President Ahmad Tejan Kabbah and formed the Armed Forces Revolutionary Council (AFRC). When President Kabbah was reinstated in 1998, the RUF and AFRC together began launching attacks in the hope of re-gaining control of Sierra Leone: the attacks reaching as far west as Freetown. In July 1999, the Lome Peace Agreement between President Kabbah and RUF leader

[31] Ibid, p. 20.

[32] Ibid, p. 23.

[33] Ibid, p. 13.

[34] Antonio Cassese, *International Criminal Law*, (2nd Edition), (Oxford University Press, 2008), pp. 6–7.

[35] Rome Statute of the International Criminal Court (2002) 2187 UNTS 90, Art. 21(3).

[36] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, (Intersentia 2002), p. 535.

[37] Alexander Grabert, *Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change*, (Herbert Utz Verlag, June 2015), p. 26.

[38] Human Rights Watch, 'The Armed Conflict in Sierra Leone' (11 April 2012) <https://www.hrw.org/news/2012/04/11/armed-conflict-sierra-leone> accessed 27 August 2018.

Foday Sankoh established a cease-fire. However, the RUF immediately violated its terms, and fighting continued until the eventual end of the war in January 2002.

During the armed conflict, hundreds of women and girls were abducted and forced to become 'bush wives' of their captors. Both the rebel forces of the AFRC and the RUF, and the government forces and their allies, including the Civil Defense Forces (CDF) were involved in such atrocities.[39] The Sierra Leone Truth and Reconciliation Commission Report highlighted that '[w]omen and girls were detained under conditions of extreme cruelty with the deliberate intention of raping them and perpetrating other acts of sexual violence upon them',[40] and that the West Side Boys, a renegade soldier group linked to the AFRC and the RUF, 'abducted women and girls, holding them against their will, forcing them into marriage, raping them, using them as sexual slaves and perpetrating a range of brutal and inhuman acts upon them'.[41] The status of 'bush wife' involved more than endurance of sexual violence – the women and girls were also forced to cook, clean and raise their captors' children,[42] as well as being beaten, branded and cut.[43] The report also found that young girls in particular were targeted – some just reaching puberty.[44]

Unfortunately, an exact statistic on how many women were forced into such 'marriages' is difficult to determine as only a few 'marriages' were entered into by way of a formal ceremony. Indeed, the 'marriages' in question were markedly different from marriage under the laws and customs of Sierra Leone, as '[t]he few official ceremonies that were performed did not conform to any recognized religious or civil union; they occurred in the absence of consent by the 'wife' or her family in violation of the requirements and forms of such marriages'.[45] It has been said that '[t]hese forced marriages demean and distort the institution of marriage itself'[46] as '[t]hese women were made to assume all the obligations of a wife while simultaneously rendered unable to acquire any of the rights or privileges traditionally and legally given to a spouse'.[47] It was found that many 'wives' remained with their 'husbands' after the war ended, due to 'stigmatization, fear and lack of re-integration options within their communities'.[48]

This paper focuses in particular on the landmark *AFRC* case and the controversial *Charles Taylor* case at the SCSL, which both consider the forced marriages which occurred during the civil war. The accused in the *AFRC* case, Brima, Kamara, and Kanu, were senior-level members of the AFRC, and were sentenced to 50 years imprisonment (Brima and Kanu) and 45 years imprisonment (Kamara) for committing, planning, or being responsible as superiors for a wide range of crimes during the conflict. The decision by the Appeals Chamber in the *AFRC* case delivered on 22 February 2008 was also 'a historic precedent for the recognition of gender crimes' finding that forced marriage falls under the 'other inhumane acts' category of crimes against humanity.[49] On the other hand, whilst Charles Taylor, the former President of Liberia, was convicted in April 2012 on 11 charges of war crimes, crimes against humanity and serious violations of international humanitarian law during the conflict and sentenced to 50 years imprisonment, the Chamber made a controversial decision to categorise forced marriages not as 'other inhumane acts' but rather as 'sexual slavery', leading some to criticise this decision as not recognising the 'multi-layered' nature of the forced marriages.[50]

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[39] Human Rights Watch, 'The Armed Conflict in Sierra Leone' (11 April 2012) <https://www.hrw.org/news/2012/04/11/armed-conflict-sierra-leone> accessed 27 August 2018.

[40] Sierra Leone, Truth & Reconciliation Commission Report, *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission* (Sierra Leone: Truth & Reconciliation Commission, 2004), <http://www.sierra-leone.org/TRCDocuments.html> accessed 27 August 2018, at Vol. 2, para 511.

[41] Ibid, para 512.

[42] Michael P. Scharf and Suzanne Mattler, Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity, Case Research Paper Series in Legal Studies, Working Paper 05–35, (October 2005), pp. 4–5.

[43] Ibid, pp. 1–2.

[44] Sierra Leone, Truth & Reconciliation Commission Report, *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission* (Sierra Leone: Truth & Reconciliation Commission, 2004), <http://www.sierra-leone.org/TRCDocuments.html> accessed 27 August 2018, at Vol. 3A, para 127.

[45] Michael P. Scharf and Suzanne Mattler, Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity, Case Research Paper Series in Legal Studies, Working Paper 05–35, (October 2005), pp. 4–5.

[46] Ibid, pp. 1–2.

[47] Ibid.

[48] Neha Jain, *Forced Marriage as a Crime against Humanity, Problems of Definition and Prosecution*, J. Int. Criminal Justice (2008), 6(5), pp. 1025–1026.

[49] Ibid, p. 1013.

[50] James M. Clark, *Forced Marriage: the Evolution of a New International Criminal Norm*, 1998, <https://www.abdn.ac.uk/law/documents/ForcedMarriage-theEvolutionofaNewInternationalCriminalNorm.pdf> accessed 27 August 2018.

B. Cambodia

In 1975, the Communist Party of Kampuchea ("CPK"), known as Khmer Rouge won the Cambodian civil war and took power. The aim of the Khmer Rouge regime, lead by Pol Pot, was to achieve a 'communist revolution' and a radical change to the idea of family in Cambodia.[51] The Khmer Rouge 'disregarded human life and produced repression and massacres on a massive scale. They turned the country into a huge detention centre, which later became a graveyard for nearly two million people, including their own members and even some senior leaders'.[52] Under the regime, marriages were conducted between people who had never met before, and were conducted in public mass ceremonies.[53] The marriages were impersonal, and married couples would usually part ways after a few days.[54] Women agreed to marriages because of violence or the fear of potential violence, or so as to avoid being sent to hard labour worksite.[55] Furthermore, the consummation of the marriage was obligatory: refusal would lead to beatings, prison or even death.[56] The marriages in Cambodia were 'a matter of state policy'.[57]

This paper considers in particular *Case 002* at the ECCC, entered on 15 September 2010, in which the four defendants, Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith, all surviving members of the Khmer Rouge Central Committee or the Standing Committee, were indicted for crimes against humanity, genocide and grave breaches of the Geneva Conventions of 1949. The Chamber found that the forced marriages in question should fall under the 'other inhumane acts' category of crimes against humanity.

C. Uganda

The Lord's Resistance Army (LRA), came to being in Northern Uganda as a rebel group led by Joseph Kony, fighting for the Acholi people. However, it quickly lost support and began attacks on the civilian population, carried out abductions and recruited thousands of children to fight. The LRA were ousted by the Ugandan army, but still continue to carry out their brutal regime in the DRC, the CAR and South Sudan. The LRA abducted one in six female adolescents in Northern Uganda, who were mainly from the Acholi, Lango and Iteso peoples,[58] and forced many of them to become their 'wives'. The atrocities committed against women and girls were a tactic of war:

> The LRA leadership exercised rigid control over the sexuality of abducted women and girls through intimidation, discrimination, and violence. The LRA leader, Joseph Kony, is thought to have forcibly married more than 40 females and to have fathered dozens of children through rape and forced marriage. At any one time his commanders had on average five forced wives, while lower level fighters had one or two.[59]

It appears that the role of the 'wives' was more than sexual slavery, and women and girls were forced to become porters, food producers and fighters.[60]

This paper considers the *Ongwen* case at the ICC. Dominic Ongwen was commander of the Sinia brigade, which was one of the four brigades of the LRA. He was charged with 70 counts of war crimes and crimes against humanity between 1 July 2002 and 31 December 2005, but in particular in relation to a violent campaign carried out on the orders of Joseph Kony in 2002 in which 2,200 people were murdered and 3,000 people were abducted, and in which there was mass recruitment of child soldiers and sexual violence against women and girls.[61] The Appeals Chamber held, in a similar way to the Appeals Chamber at the SCSL in the

[51] Neha Jain, *Forced Marriage as a Crime against Humanity, Problems of Definition and Prosecution*, J. Int. Criminal Justice (2008), 6(5), pp. 1024–1025.

[52] <http://www.cambodiatribunal.org/history/cambodian-history/khmer-rouge-history/> accessed 27 August 2018.

[53] Closing Order, Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan, Case File No. 002/19-09-2007-ECCC-OCIJ, OCIJ 15 September 2010, para 844.

[54] Neha Jain, *Forced Marriage as a Crime against Humanity, Problems of Definition and Prosecution*, J. Int. Criminal Justice (2008), 6(5), pp. 1024–1025.

[55] Ibid.

[56] *Case 002*, para 858.

[57] Neha Jain, *Forced Marriage as a Crime against Humanity, Problems of Definition and Prosecution*, J. Int. Criminal Justice (2008), 6(5), pp. 1025–1026.

[58] Khristopher Carlson, LL.M., & Dyan Mazurana, Ph.D., Forced Marriage within the Lord's Resistance Army, Uganda, Feinstein International Center, (May 2008), p. 4.

[59] Ibid.

[60] Ibid.

[61] <http://alamun.com/committees/bg/ICCA.pdf> accessed 11 August 2016.

AFRC case and the ECCC in *Case 002*, that the forced marriages in question constituted 'other inhumane acts' within the meaning of the Rome Statute.

D. Elements of the Crime of Forced Marriage

By considering the nature of the forced marriages which occurred in the conflicts in Sierra Leone, Cambodia and Uganda, elements of a crime of forced marriage can be deduced. The *actus reus* could be the forcing of a person to serve as a *de facto* spouse, including coercing them to perform acts or carry out tasks of a non-sexual and/or sexual nature. The *mens rea* of the crime could be, as for many crimes against humanity, that the perpetrator had the necessary intent to impose such *de facto* marriages. The SCSL, ECCC and ICC are in consensus that forced marriages are acts worthy of criminalisation, however, so far there has not been an overwhelming effort to include it as a new distinct crime within crimes against humanity. Instead, the question has been whether forced marriage can be subsumed under other crimes already listed in their statutes.

IV. The Categorisation of Forced Marriage versus the NCSL Principle

As Schabas states, the NCSL principle in ICL is mainly a principle of interpretation – 'a Chamber should construe a provision in a manner that favours respect for the principle of legality, to the extent this is possible'.[62] This Section focuses on whether the interpretation of forced marriage as falling under either the crimes of 'sexual slavery' by the SCSL or 'other inhumane acts' by the SCSL, ECCC, and the ICC does indeed comply with the four corollary principles of the NCSL principle.

4.1. Nullum crimen sine lege scripta

For a provision to comply with the NCSLS principle it must be written in law. As the tribunals and the ICC have interpreted forced marriage as constituting either the crime of 'sexual slavery' or 'other inhumane acts', it is the equation of forced marriages with these crimes by judges which must be assessed against the NCSLS principle.

4.1.1. 'Sexual slavery'

The category of 'sexual slavery' is written in law in Article 2(g) of the SCSL Statute and Article 7(1)(g) of the Rome Statute, which also prohibit rape, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.[63,64,65] It is clear that including 'sexual slavery' in the drafting of the Rome Statute, was 'not only an obvious codification of a specific kind of slavery increasingly recognized as a major problem worldwide, but it was also a contemporary and more correct way to describe certain harms that might otherwise have been narrowly referred to as "enforced prostitution" in an earlier era'.[66] If we consider forced marriages to have the *actus reus* as set out in subsection 3.4, then it is impossible to equate them with 'sexual slavery' as currently written in law, because forced marriages are multi-layered in nature. The tribunals or the ICC would have to see forced marriages as purely sexual acts to categorise them as 'sexual slavery', in line with the NCSLS principle.

4.1.2. 'Other inhumane acts'

The category of 'other inhumane acts' is written in law in Article 2(i) of the SCSL Statute, Article 5 of the ECCC Law, and Article 7(1)(k) of the Rome Statute. The Appeals Chamber in the *AFRC* case highlighted that, ever since its first inclusion in ICL in Article 6(c) of the Nuremberg Charter,[67] the objective of the category of 'other inhumane acts' was to be a residual provision which covered crimes which were not specifically recognised as crimes against humanity, and therefore to fill in any 'loophole left open'.[68] Due to their gravity, forced marriages could therefore be included in such a residual crime category. Such a categorisation by the tribunals or the ICC would comply *prima facie* with the NCSLS principle.

Summing up, equating forced marriages to 'sexual slavery' would not comply with the NCSLS principle, if forced marriages are considered to be multi-layered crimes. However, they could indeed be categorised as 'other inhumane acts', in line with this corollary principle, due to the broad and residual nature of this category.

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[62] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford University Press, 2010), p. 409.

[63] The Statute of the Special Court for Sierra Leone, (2002), 2178 UNTS 138, 145; 97 AJIL 295; UN Doc. S/2002/246.

[64] Rome Statute of the International Criminal Court, (2002), 2187 UNTS 90.

[65] This is omitted from the SCSL Statute.

[66] Valerie Oosterveld, 'Sexual slavery and the ICC', Michigan Journal of International Law, (2004), 25(3), p. 608.

[67] Charter of the International Military Tribunal, (1945), 59 Stat. 1544, 82 UNTS 279.

[68] *Prosecutor v Alex Tamba Brima et al.*, SCSL-2004-16-A, 22 February 2008, ("*AFRC* case"), para 183.

4.2. Nullum crimen sine lege certa

To assess whether the tribunals' and ICC's interpretation of forced marriage as either 'sexual slavery' or 'other inhumane acts' complies with NCSLC principle, these crimes would have to remain sufficiently precise and detailed.

4.2.1. 'Sexual slavery'

The ICC EoC describes the *actus reus* of 'sexual slavery'. Element 1 of Article 7(1)(g)-2 states that it will be satisfied if '[t]he perpetrator exercised any or all of the powers attaching to the right of 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' and, as per Element 2, '[t]he perpetrator caused such person or persons to engage in one or more acts of a sexual nature'. The ICC EoC also notes that deprivation of liberty may 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'.[69] Element 4 of Article 7(1)(g)-2 of the ICC EoC sets out the *mens rea*: that 'the 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'. It appears that the definitions in the ICC EoC focus attention not on the dignity of the victims, but instead on the *perpetrators*' actions.[70]

The Appeals Chamber in the *AFRC* case confirmed these elements of the crime of 'sexual slavery', stating the definition within the SCSL Statute to be: 'the perpetrator's exercising any or all of the powers attaching to the right of ownership over one or more persons by imposing on them a deprivation of liberty, and causing them to engage in one or more acts of a sexual nature'.[71] Furthermore, an act will constitute 'sexual slavery' only if the *chapeau* elements which apply to all crimes against humanity are also satisfied. It is worth noting that the ECCC Law does not explicitly mention the crime of 'sexual slavery', however the crime has been recognised as forming part of customary international law.[72]

A question has been raised, however, as to how 'sexual slavery' differs from the concept of 'enforced prostitution', which is also prohibited under Article 2(g) of the SCSL Statute and Article 7(1)(g) of the Rome Statute. Some believe that the concepts are interchangeable, but that the term 'sexual slavery' better describes the acts prohibited by 'enforced prostitution': 'It has been said that "[w]hile "(en)forced prostitution" is usually the term used when women are forced into sexual servitude during wartime, the term "sexual slavery" more accurately identifies the prohibited conduct."'.[73] It is the case, however, that both concepts were included in the SCSL and ICC Statutes, and this 'was a recognition that the crime of enforced prostitution might be too narrow to capture all of the violations that the crime of sexual slavery can capture and thus that it is appropriate to distinguish between the two crimes'.[74]

Furthermore, it is also questionable as to how 'sexual slavery' differs from the concept of 'enslavement' which is prohibited under Article 7(1)(c) of the Rome Statute, Article 5 of the ECCC Law, and Article 2(c) of the SCSL Statute. In the drafting of the Rome Statute, some argued that including a separate category of 'sexual slavery' in addition to the term 'enslavement' would lead to unwanted overlapping. However, academics such as Bassiouni and non-governmental organisations such as the Women's Caucus for Gender Justice in the ICC recommended that the categories be listed separately.[75] Whilst the categories are indeed listed separately in both the Rome Statute and the SCSL Statute, the ICC EoC ambiguously include the definition of 'enslavement' as also forming part of the Elements of the crime of 'sexual slavery'. It was argued that 'the reference to purchase or sale might be too limiting, but it was concerned that simply reproducing the definition of enslavement found in the Rome Statute might be too imprecise to satisfy the doctrine of *nullem crimen sine lege*'.[76] Furthermore, it has been felt that there is too much emphasis on

[69] ICC Elements of Crimes, footnote 18.

[70] Valerie Oosterveld, *Sexual slavery and the ICC*, Michigan Journal of International Law, (2004), 25(3), p. 608.

[71] *AFRC* case, para 188.

[72] Valerie Oosterveld, *Sexual slavery and the ICC*, Michigan Journal of International Law, (2004), 25(3), p. 608.

[73] Valerie Oosterveld, *Sexual slavery and the ICC*, Michigan Journal of International Law, (2004), 25(3), pp. 618–619, referencing Kelly D. Askin, *Women and International Humanitarian Law*, I Women and International Human Rights Law 41, 48 n.29 (Kelly D. Askin & Dorean M. Koenig eds., 1999).

[74] Valerie Oosterveld, *Sexual slavery and the ICC*, Michigan Journal of International Law, (2004), 25(3), p. 622.

[75] Ibid, p. 624.

[76] Ibid, p. 631.

the pecuniary aspect, and that the phrase 'similar deprivation of liberty' could be read as meaning being similar to actions of a pecuniary nature.[77] Ultimately, however, keeping the categories of 'sexual slavery' and 'enslavement' separate in both the ICC and the SCSL Statutes, recognises the crime as a prevalent contemporary crime warranting express recognition,[78] increases the statutes' gender sensitivity and also brings ICL in line with IHRL, which recognises 'sexual slavery' as 'a form of slavery that should be specifically named'.[79–80]

Whilst the acts of 'sexual slavery' and forced marriages may overlap in some ways in terms of their *actus reus* and *mens rea*, the sexual element is not the defining characteristic of forced marriages, as noted in subsection 3.4. The scope of 'sexual slavery' is very narrow, and therefore it would not be sufficiently clear and specific if forced marriages were subsumed under this category. To do so allow runs the risk of non-compliance with the NCSLC principle.

4.2.2. 'Other inhumane acts'

Article 7(1)(k) of the Rome Statute narrows the definition of 'other inhumane acts' by stating that the act in question must be of 'a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'. Furthermore, Elements 1 and 2 of Article 7(1)(k) of the ICC EoC set out the *actus reus* as an act which inflicts 'great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act', and which is 'of a character similar to any other act referred to in article 7, paragraph 1, of the Statute'. The term 'character' refers to the nature and gravity of the act.[81] Element 3 of Article 7(1)(k) of the ICC EoC states the *mens rea*: that the 'perpetrator was aware of the factual circumstances that established the character of the act'. Indeed, the ICC stated that 'other inhumane acts' must 'intentionally [cause] great suffering, or serious injury to body or to mental or physical health'.[82] Both the ECCC and SCSL have confirmed this tripartite test so as to satisfy the *actus reus* and *mens rea* of 'other inhumane acts' in the context of their respective statutes.[83] It is also important to note that the *chapeau* elements also apply in the same way they do to all crimes against humanity.

The category of 'other inhumane acts' has, however, been criticised as not providing 'an indication, even indirectly of the legal standards which would allow us to identify the prohibited inhumane acts'.[84] It is, indeed, the residual nature of the category which has led to arguments that it lacks in clarity, precision, definition, and certainty, and that is it therefore a violation of the NCSLC principle. Such categories are non-exhaustive,[85] and are designed to provide a gap-filling function, if other acts of crimes against humanity do not seem fitting.[86] The Appeals Chamber in the *AFRC* case noted that in drafting the provision, it was felt that creating an exhaustive list would merely lead to 'evasion of the letter of the prohibition'.[87] The drafters felt it was impossible to specify in advance every act which could qualify as a crime against humanity in the future.[88]

The lack of precision in the provision of 'other inhumane acts' makes it difficult to determine whether the categorisation by the tribunals and the ICC of forced marriage under this crime is legally warranted. It seems that whilst the *actus reus* and *mens rea* requirements of the crime of 'other inhumane acts' have been delineated in the statutes of the tribunals and the ICC, and in the ICC EoC, the exact scope of the crime has not yet been clarified, and, therefore, if it is unclear as to how 'inhumane acts' may be identified,[89] it may be difficult to determine whether forced marriages qualify as 'other inhumane acts'. When it comes to interpretation of the 'other inhumane acts' provision, whilst tribunals should refrain from being too restrictive:[90]

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[77] Ibid, p. 632.

[78] Ibid, p. 625.

[79] Ibid, p. 625.

[80] Ibid, p. 623.

[81] ICC Elements of Crimes, Article 7(1)(k), Element 2, footnote 30.

[82] *Ongwen* case, para 88.

[83] *Case 002*, paras 1443 and 1444; *AFRC* case, para 183.

[84] William A. Schabas, *An Introduction to the International Criminal Court*, (Cambridge University Press, 2011), p. 120, referring to *Kupreškić et al.*, IT-95-16-T, Judgment, 14 January 2000, para 565.

[85] *Kupreškić et al.*, IT-95-16-T, Judgment, 14 January 2000, para 563.

[86] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford University Press, 2010), p. 409.

[87] *AFRC* case, para 183.

[88] Kevin Heller, Markus Dubber (eds.), *The Handbook of Comparative Criminal Law*, (Stanford University Press, 2010), p. 621.

[89] Iris Haenen, 'Classifying acts as crimes against humanity in the Rome Statute of the International Criminal Court', German Law Journal, (2013), 14, p. 821.

[90] *AFRC* case, para 185.

> Care must be taken not to make [the category of "other inhumane acts"] too embracing as to make a surplusage of what has been expressly provided for, or to render the crime nebulous and incapable of concrete ascertainment. An over-broad interpretation will certainly infringe the rule requiring specificity of criminal prohibitions.[91]

However, the 'yardstick that is provided is the *eiusdem generis* rule of interpretation, which requires that the act in question is of a comparable gravity to the listed crimes against humanity'.[92] Residual categories in general are often argued to be in conflict with the NCSLC principle, however the 'comparable gravity' requirement prevents such categories from being extended too far, so as to comply. Whilst questions do arise as to the exact meaning of 'comparable gravity', it is clear that the requirement is intended to place a limit on the types of crimes which could be subsumed within the residual category of 'other inhumane acts'. While it will always be a question of interpretation for the international criminal tribunals and ICC, if the *actus reus* and *mens rea* of forced marriages are taken to be that as outlined in subsection 3.4, it could be argued that such acts would be of sufficient gravity so as to be included as 'other inhumane acts'. This provision would remain sufficiently specific so as to comply with the NCSLC principle.

A pattern therefore emerges – it seems more appropriate to include forced marriages as 'other inhumane acts', than categorising them as 'sexual slavery'. Moreover, the crime of 'sexual slavery' would become unclear if a crime with more than just sexual elements were considered identical. Notwithstanding that the scope of the category is not precisely defined, the categorisation of forced marriages under 'other inhumane acts' does satisfy the 'comparable gravity' requirement, and thus the category remains sufficiently clear and succinct to meet the NCSLC principle.

4.3. Nullum crimen sine lege praevia

The NCSLP principle demands the act in question must have existed in law at the time the offence was committed. Again, as the specific act of forced marriage does not exist as a crime in ICL, it is the tribunals' and ICC's categorisation of forced marriage as 'sexual slavery' or 'other inhumane acts' which must be assessed against the NCSLP principle.

4.3.1. 'Sexual slavery'

Whether the categorisation of forced marriage under this provision conflicts with the NCSLP principle depends on whether forced marriage can be regarded as constituting a distinct crime or whether it constitutes 'sexual slavery'. The latter would cause no conflict with the principle, as 'sexual slavery' has always been included as a crime in the statutes. However, it seems that if forced marriages have the *actus reus* and *mens rea* as suggested in subsection 3.4, then it may not necessarily be foreseeable that the act of forced marriage is criminalised by virtue of this provision. As excavated in the examples given in Section 3, whilst often forced marriages have sexual elements, this is not their defining characteristic, and therefore, it is difficult to see them as having existed as a crime under the category of 'sexual slavery' at the time of the offences in Sierra Leone, Cambodia and Uganda. On the other hand, recognising forced marriage as a distinct crime and categorising it under the residual category of 'other inhumane acts' may also be effectively 'cultivat[ing]' a crime which is not already listed but which is recognised in international law into already existing provisions.[93]

4.3.2. 'Other inhumane acts'

International tribunals and the ICC have already recognised several acts to fall under the broad category of 'other inhumane acts', including forcible transfer, sexual and physical violence on corpses, the coercion of women to perform tasks naked, forced disappearance, psychological abuse and confinement in inhumane conditions.[94] Some argue that a provision allowing for such judicial creativity cannot be regarded as a 'legitimate practice',[95] as individuals should know which actions constitute crimes in ICL so

[91] Ibid, para 185.

[92] Iris Haenen, 'Classifying acts as crimes against humanity in the Rome Statute of the International Criminal Court', German Law Journal, (2013), 14, p. 821.

[93] Jennifer Lincoln, *Nullum Crimen Sine Lege in International Criminal Tribunal Jurisprudence: The Problem of the Residual Category of Crime*, Eyes on the ICC, (2011), 7(1), p. 144.

[94] *AFRC* case, para 184.

[95] Jennifer Lincoln, *Nullum Crimen Sine Lege in International Criminal Tribunal Jurisprudence: The Problem of the Residual Category of Crime*, Eyes on the ICC, (2011), 7(1), p. 146.

as to conduct themselves appropriately. However, the Appeals Chamber in the *AFRC* case made reference to the case of *Blaškić*, in which the International Criminal Tribunal for Former Yugoslavia Trial Chamber stated that:

> [h]owever much care [was] taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wish to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.[96]

It seems that whilst the principle of non-retroactivity plays an important role in any criminal justice system, ICL must also be capable of adapting and developing. As Cassese argues, ICL is primarily judge-made, and therefore 'one should reconcile the principle of non-retroactivity with these inherent characteristics of ICL'.[97]

The provision of 'other inhumane acts' was designed at the point of drafting to perform a gap-filling function. Forced marriages legitimately fall under this category in the same way as the acts mentioned above, as, if they are considered to have the *actus reus* and *mens rea* suggested, they satisfy the elements of the crime of 'other inhumane acts', and indeed are of comparable gravity. It would also appear that, as forced marriages cause considerable harm, it would be reasonably foreseeable that they could be criminalised as 'other inhumane acts'.

It is difficult to determine whether it could have been predicted that forced marriages constitute sexual slavery, and thus unclear whether categorisation as such would comply with the NCSLP principle. Thus, overall, it is understandable that it would be more foreseeable that forced marriages may be criminalised under 'other inhumane acts' as it is a catch-all category, and therefore considering forced marriages as such would be in compliance with the NCSLP principle.

4.4. Nullum crimen sine lege stricta

As Cassese has noted, the fact that courts must only apply laws which existed at the time when the crime was committed does not mean that courts may not 'refin[e] and elaborate upon, by way of legal construction, existing rules'.[98] Courts should not create *new* offences with new elements i.e. a new *actus reus* or *mens rea*, but may adapt existing provisions in line with changes in social circumstances.[99] He exemplifies such an adaptation as a widening of the scope of the *actus reus* or lowering the *mens rea* threshold in line with general principles.[100] This position has been confirmed by others who believe that '[t]he ability to expand the understanding of a law or crime does not equate to allowing a court to prosecute crimes that were not formally legislated within its jurisdiction'.[101] In Cassese's view, if a court seeks to adapt a provision by widening the scope of the *actus reus* by including a certain act, such an act must:

> (i) be in keeping with the rules of criminal liability relating to the subject matter, more specifically with the rules defining "the essence of the offence"; (ii) conform with, and indeed implement and actualize, fundamental principles of ICL or at least general principles of law; and (iii) be reasonably foreseeable by the addressees; in other words the extension, although formally speaking it turns out to be to the detriment of the accused could have been reasonably anticipated by him, as consonant with general principles of international criminal law.[102]

When it comes to assessing how forced marriage should be categorised as a crime against humanity, there are inherent problems with the NCSLSt principle (which prohibits extension of a rule by way of analogy), in that the category of 'other inhumane acts' demands a form of analogy by way of the *ejusdem generis* canon of statutory construction: 'whereby when in a legal rule a general clause follows the enumeration of

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[96] *Prosecutor v Blaskic*, IT-95-14-T, Trial Chamber Judgment, 3 March 2000, para 237.

[97] Antonio Cassese, *Cassese's International Criminal Law*, 3rd Edition, (Oxford University Press, April 2013), p. 30.

[98] Antonio Cassese, *Cassese's International Criminal Law*, 3rd Edition, (Oxford University Press, April 2013), p. 30.

[99] Ibid, p. 32.

[100] Ibid.

[101] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, (Intersentia 2002), p. 535.

[102] Nicholas Azadi Goodfellow, 'The Miscategorization of "Forced Marriage" as a Crime against Humanity by the Special Court for Sierra Leone', International Criminal Law Review (2011), Vol. 11, p. 845, see also Antonio Cassese, *Cassese's International Criminal Law*, 3rd Edition, (Oxford University Press, April 2013), p. 31.

a particular class of persons or things, the general clause must be construed as applying to persons or things of the same kind or class as those enumerated'.[103] However, for the categorisation of forced marriages under either the crime of 'sexual slavery' or 'other inhumane acts' to comply with the principle, the tribunals or the ICC must conclude that either the act of forced marriage satisfied the *actus reus* and *mens rea* requirements of the crimes of 'sexual slavery' or 'other inhumane acts', or that these crimes are able to adapt so as to include it within their remit.

4.4.1. 'Sexual slavery'

The Trial Chamber at the SCSL in the *AFRC* case considered whether forced marriages satisfied the *actus reus* and *mens rea* of 'sexual slavery' and found that the relationships between the perpetrators and their victims was that of ownership, and that the fact that the victims were labelled as 'wives' demonstrated intent on the part of the perpetrators.[104] It also held that evidence pointed to the fact that the forced marriages were sexual in nature.[105] In line with this view, the Trial Chamber in the *Charles Taylor* case at the SCSL held that forced marriages constitute a form of 'conjugal slavery' and 'while they may constitute more than sexual slavery, they nevertheless satisfy the elements of sexual slavery'.[106] Indeed, the Trial Chamber in this case held that:

> 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 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.[107]

However, the Appeals Chamber in the *AFRC* case did not agree and stated that whilst forced marriages do have some elements of the crime of sexual slavery, for example, forced sexual intercourse and the deprivation of liberty, it was the forcing of a person into a conjugal partnership causing great suffering or serious mental or physical injury to the victim, and the exclusivity of the relationship, that were the distinguishing factors.[108] Furthermore, at the ICC in the *Ongwen* case, the Chamber held that, whilst forced marriage often occurs in conditions involving 'restrictions on the freedom of movement, repeated sexual abuse, forced pregnancy, or forced labour', and, indeed, 'forced marriage will generally be committed in circumstances in which the victim is also sexually or otherwise enslaved by the perpetrator', such conditions are insufficient to establish the crime.[109] The Chamber made clear that the harm suffered in forced marriages goes beyond that of the crime of 'sexual slavery'.[110] It agreed with the Appeals Chamber of the SCSL in the *AFRC* case that forced marriage is a 'relationship of exclusivity between the "husband" and "wife", which could lead to disciplinary consequences for breach of this exclusive arrangement and, therefore, is "not predominantly a sexual crime"',[111] and, therefore, felt it appropriate to consider the forced marriages in question as a separate charge of 'other inhumane acts' under Article 7(1)(k) of the Rome Statute.[112] Indeed, that Chamber found that the crimes of 'sexual slavery' and 'other inhumane acts' differ in terms of 'conduct, ensuing harm, and protected interests'.[113]

The tribunals and the ICC have come to conflicting conclusions on whether forced marriage satisfies the elements of the crime of 'sexual slavery'. It seems, however, that the majority of the decisions have followed the premise that 'when the conduct in question contains at least one distinct element which is not included in the definition of [sexual slavery], [that existing crime] will not adequately cover the distinguishing

[103] Antonio Cassese, *Cassese's International Criminal Law*, 3rd Edition, (Oxford University Press, April 2013), p. 34.

[104] *AFRC* case, para 188.

[105] Ibid, para 188.

[106] *Charles Taylor* case, para 428.

[107] Ibid, para 430.

[108] *AFRC* case, para 195.

[109] *Ongwen* case, paras 92–93.

[110] Ibid, para 94.

[111] Ibid, para 93, referencing *AFRC* case, para 195.

[112] Ibid, para 95.

[113] Ibid, para 92.

characteristics of this conduct and consequently will not completely subsume that [conduct]'.[114] This demonstrates a certain degree of strict construction on the part of the tribunals and the ICC, and is arguably in line with Cassese's view that the *actus reus* of a provision should not be extended without good reason. Indeed, the tribunals and the ICC could be in compliance with the NCSLSt principle by opting *not* to categorise the forced marriages in question under 'sexual slavery', as to do so would be an attempt to mould a crime with distinct elements into such a category. However, as the general trend seems to be to categorise forced marriage under the crime of 'other inhumane acts', is such an interpretation also in compliance with the NCSLSt principle?

4.4.2. 'Other inhumane acts'

In considering whether forced marriages satisfied the *actus reus* and *mens rea* of 'other inhumane acts', the Appeals Chamber at the SCSL in the *AFRC* case examined the nature of the forced marriages in question and the effects on the physical, moral and psychological health of the victims,[115] and found sufficient evidence that during the conflict in Sierra Leone, women and girls were systematically abducted, often with use of extreme violence, by AFRC troops and forced to serve as 'conjugal partners'.[116] This involved moving with the troops, performing conjugal duties such as forced domestic labour, forced pregnancy, and bringing up any child or children of the 'marriage', as well as sexual intercourse.[117] Furthermore, any non-compliance with the exclusivity of the 'relationship', such as unfaithfulness, or unwillingness to perform conjugal duties would lead to severe forms of punishment such as beatings, or in certain instances, death.[118] The Appeals Chamber took into account the Prosecution expert, Mrs Zainab Bangura's findings that:

> The use of the term "wife" by the perpetrator was deliberate and strategic. [...] Bush wives' were constantly sexually abused, physically battered during and after pregnancies, and psychologically terrorised by their husbands, who thereby demonstrated their control over their wives. Physically, most of these girls experienced miscarriages, and received no medical attention at the time [...] Some now experience diverse medical problems such as severe stomach pains [...] some have had their uterus removed; menstrual cycles are irregular; some were infected with sexually transmitted diseases and others tested HIV positive.[119]

The Appeals Chamber therefore agreed with Justice Doherty's Partly Dissenting Opinion at the trial stage that the fact that the victims were subjected to mental and psychological trauma, and stated that this meant that the forced marriages in question were of comparable gravity to other crimes against humanity listed in the SCSL Statute.[120] In assessing whether the *mens rea* of the crime of 'other inhumane acts' was satisfied, the Chamber held that the perpetrators intended to force the women and girls into a conjugal partnership, and were aware of the suffering their actions would cause for the victims.[121] Indeed, the Chamber found that the perpetrators 'could not have been under any illusion that their conduct was not criminal', and that this assumption is 'fortified' by their commission of other crimes such as enslavement, imprisonment, rape, and sexual slavery during the 'marriage'.[122]

At the ECCC, the Chamber in *Case 002* found that in several forced marriages, violence, death threats and even executions occurred if the women or girls refused, and therefore the victims 'were too afraid to articulate their objection'.[123] There was evidence that marriages denied the parents any involvement, and, thus, that they disrespected tradition.[124] Furthermore, witnesses confirmed that the marriages involved the victims being forced to 'consummate [the] union', which, as the Chamber held, 'corroborates the existence of a common purpose established by the senior leaders of the CPK that marriages were necessary to increase

[114] Iris Haenen, 'Classifying acts as crimes against humanity in the Rome Statute of the International Criminal Court', German Law Journal, (2013), 14, p. 810.

[115] *AFRC* case, para 200.

[116] Ibid, para 190.

[117] Ibid, para 190.

[118] Ibid, para 191.

[119] Ibid, para 192.

[120] Ibid, para 193.

[121] Ibid, para 201.

[122] Ibid, para 201.

[123] *Case 002*, para 1447.

[124] Ibid, para 1447.

the population'.[125] In the Chamber's view, the evidence meant that the victims underwent 'serious physical or mental suffering or injury or a serious attack on human dignity of a degree of gravity comparable to that of other crimes against humanity', and that the perpetrators 'knew of the factual circumstances that established the gravity of their acts', and, thus, that the *actus reus* and the *mens rea* of the crime were satisfied.[126]

Furthermore, the Appeals Chamber at the ICC in the *Ongwen* case highlighted that the imposition of 'marriage', the duties associated with marriage, and the social status of being a perpetrators 'wife' on the victim, regardless of their will, were the fundamental elements of forced marriage.[127] It did not matter that the marriages were illegal, the factual imposition of 'marriage' on the victim was unacceptable.[128] The Chamber held that through the exclusivity of the 'marriage', the victims dealt with the imposition of a social stigma, and suffered 'additional harm to those of the crime of sexual slavery'.[129] It agreed with the determinations made by the SCSL Appeals Chamber in the *AFRC case* and ECCC in *Case 002*, holding that:

> forcing another person to serve as a conjugal partner may, per se, amount to an act of a similar character to those explicitly enumerated by article 7(1) 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[.][130]

The tribunals and the ICC in these cases are in agreement that forced marriages satisfy the *actus reus* and *mens rea* requirements of the crime of 'other inhumane acts', and therefore it would appear *prima facie* that they are in compliance with the NCSLSt principle in coming to such conclusions.

The trend is to rely heavily on IHRL and Section 5 discusses whether such reliance on IHRL alone as a basis for decisions at the tribunals and the ICC is legally warranted. The decisions by the tribunals and the ICC must be based on the appropriate reasoning and must not neglect entirely the NCSL principle.

5. Inadequacy of the judgments: reliance of the tribunals and the icc on ihrl

The tribunals' and ICC's use of IHRL in coming to their decisions on whether forced marriages fall under the crime of 'other inhumane acts' is a clear reflection of the tensions between creating stability and permitting development in ICL mentioned in Section 2. It is the case that IHRL and ICL do, indeed, overlap in terms of both 'their substantive norms and underlying philosophies'.[131] Both fields of law were part of the movement which arose after World War II towards the recognition of the individual in international law and share the values of human dignity and the autonomy of the individual, and 'have a common base'.[132] ICL has been argued to punish severe human rights violations, and was hoped to mitigate the problem of effective enforcement – indeed, it is often noted that one of the main aims of ICL is to end impunity.[133] International criminal tribunals and the ICC have looked to IHRL for the purposes of interpretation, and to determine definitions and elements of crimes, due to the overlaps between these fields of law.[134]

The judgments of the tribunals and the ICC made clear reference to IHRL as a basis for their decisions that forced marriages constituted 'other inhumane acts'. Indeed, Justice Doherty in her dissenting opinion at the trial stage in the *AFRC* case (which the Appeals Chamber took into account), made reference to international rules which prohibit forced marriage such as Article 23(3) of the International Covenant on Civil and Political Rights, Article 5(1), 6(a) and 7 of the Convention on the Elimination of all Forms of Discrimination against Women, and Article 1(1) of the Convention on Consent to Marriage, Minimum Age for Marriage and

[125] Ibid, para 1447.

[126] Ibid, paras 1443 and 1444.

[127] *Ongwen* case, para 93.

[128] Ibid, para 93.

[129] Ibid, paras 93 and 94.

[130] Ibid, para 91.

[131] Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, David Harris (eds.), *International Human Rights Law*, (Oxford University Press, 2010), p. 497, referencing Gasser, '*The Changing Relationship Between International Criminal Law, Human Rights Law and Humanitarian Law*,' in Doria *et al.* (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blischenko*, (Kluwer, 2009), p. 1111.

[132] Eibe Riedel, Gilles Giacca, Christophe Golay, *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, (Oxford University Press, 2014), p. 344, quoting R. Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd Edition (Cambridge University Press, 2010), p. 13.

[133] ICC Statute, Preamble, para 5.

[134] Eibe Riedel, Gilles Giacca, Christophe Golay, *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, (Oxford University Press, 2014), p. 345.

Registration of Marriage, as well as regional treaties such as Article 18(3) of the African Charter on Human and Peoples' Rights.[135] She stated that '[b]y vitiating the will of one party and forcing him or her to enter into and remain in a marital union the victim is subjected to physical and mental suffering the phenomenon of forced marriage transgresses the internationally accepted conventions'.[136] The ECCC, in *Case 002*, stated that forced marriages constitute 'other inhumane acts' with reference to customary international law, and Article 16(1) and (2) of the Universal Declaration of Human Rights, Article 1(c)(i) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Article 10(1) of the International Convention on Economic, Social and Cultural Rights, Article 5(d)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination, Articles 17(3) and (4) of the American Convention on Human Rights and Article 12 of the European Convention on Human Rights, in addition to those mentioned by Justice Doherty in the *AFRC* case. Furthermore, the Appeals Chamber in the *Ongwen* case also made reference to IHRL in stating that forced marriage violates the right to consensually marry and establish a family, contained in numerous human rights instruments,[137] and that it is the violation of this right which 'demands protection through the appropriate interpretation of article 7(1)(k) of the Statute'.[138]

However, is it just if the tribunals and the ICC rely heavily on IHRL as the basis for their decisions? Cassese states that whilst ICL prohibits the extension of a rule so as to include an act which is not covered by the law, it *may* rule on an issue not covered by a specific provision by considering general principles of international law, general principles of criminal justice, or principles common to major legal systems.[139] Both national and international criminal courts have confirmed that such principles may be used.[140] Article 21 of the Rome Statute states that the ICC may refer to 'principles and rules of international law' and any 'general principle of law' and Article 21(3) states that the interpretation of ICL must be consistent with internationally recognised human rights.[141–142] However, the principles should only be used to provide clarification or 'give a clear legal contour to' and, thus, to interpret rules already set out, or rules of customary international law, and not to 'create new classes of criminal conduct'.[143]

Some argue that there should be a 'more forceful divorce between international criminal law and human rights law, […] advising against the use of human rights law as guidance for the interpretation of substantive criminal law'.[144] An international rule is not automatically a criminal prohibition enforceable before an international criminal court or tribunal',[145] and, thus, there some judges are hesitant to use IHRL in coming to decisions in relation to crimes against humanity.[146] For example, at the ICTY,[147] the Trial Chamber in the *Stakić* case stated that 'regardless of the status of the [human rights] instruments under customary international law, the rights contained therein do not necessarily amount to norms recognised by international criminal law'.[148] IHRL 'has a basis in State responsibility, and, as such has been the subject of broad interpretation, but where we are speaking of individual criminal responsibility, the interests of the defendant, in particular the *nullum crimen sine lege* principle speak the other way'.[149] Phrased in basic terms, '[h]olding a State responsible for a violation of IHRL and putting someone in prison are not the same thing'.[150]

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[135] *Prosecutor v Alex Tamba Brima et al.*, SCSL-2004-16-T, 20 June 2007, Partly Dissenting Opinion of Judge Doherty on Count 7- sexual slavery, and Count 8 – 'forced marriage', para 63.

[136] Ibid, para 71.

[137] E.g. International Covenant on Civil and Political Rights, 999 UNTS 14668 (1976), Article 23; Universal Declaration of Human Rights, United Nations General Assembly Resolution 217 A(III) (1948), Article 16; Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13 (1981), Article 16.

[138] *Ongwen* case, para 94.

[139] Antonio Cassese, *Cassese's International Criminal Law*, 3rd Edition, (Oxford University Press, April 2013), p. 34.

[140] Ibid.

[141] ICC Statute, Article 21(1)(b).

[142] ICC Statute, Article 21(1)(c).

[143] Antonio Cassese, *Cassese's International Criminal Law*, 3rd Edition, (Oxford University Press, April 2013), p. 34.

[144] Eibe Riedel, Gilles Giacca, Christophe Golay, *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, (Oxford University Press, 2014), p. 348.

[145] Nicholas Azadi Goodfellow, 'The Miscategorization of "Forced Marriage" as a Crime against Humanity by the Special Court for Sierra Leone', International Criminal Law Review (2011), Vol. 11, p. 855.

[146] Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflict*, (Martinus Nijhoff Publishers, 2012), p. 255.

[147] International Criminal Tribunal for the former Yugoslavia.

[148] *Prosecutor v Stakic Judgment*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para 721.

[149] Robert Cryer, 'ESIL-International Human Rights Law Symposium: International Criminal Law and International Human Rights Law' (5 February 2016) <http://www.ejiltalk.org/esil-international-human-rights-law-symposium-international-criminal-law-and-international-human-rights-law/> accessed 27 August 2018.

[150] Ibid.

Therefore, if an international rule is to be relied on as the basis for a decision at the tribunals or the ICC, it must infer a criminal prohibition and have *actus reus* and *mens rea* elements. In addition, to qualify as a criminal prohibition, 'its prosecution must be foreseeable as a realistic possibility' and the '[o]verwhelming preponderance of states, courts, conventions, jurists and so forth relied upon to crystallize the international law 'norm' intended – or now intend – this rule to have penal consequences for individuals brought before international courts, whether or not such a court presently exists with jurisdiction over them'.[151] If this is not the case, then the tribunals' or the ICC's heavy use of such a rule as the basis for a decision runs the risk of violating the NCSL principle, as to comply, judges must base their decisions on written law, with a clear and specific criminal ingredients.

The tribunals' and ICC's decisions that forced marriages constitute 'other inhumane acts' are, therefore, based on flawed reasoning. The Appeals Chamber's use, in the *AFRC* case, of 'society's disapproval' of forced marriages as evidence that it constitutes a criminal prohibition in international law is insufficient – the Chamber made no reference to any explicit rule or norm which confirms this notion.[152] The similar lack of explanation by the ECCC and the ICC Appeals Chamber as to how the human rights norms referred to equate to a criminal prohibition capable of prosecution before an international tribunal or the ICC, has been regarded as a key inadequacy in their judgments.[153] The condemnation by society of a certain act, or the prominence of such an act as a prohibition in human rights instruments may be indicators to the tribunals or the ICC when it comes to making decisions, but 'more is required to deduce a criminal norm from an international human rights instrument' and a decision will only adhere to the NCSL principle if it is based on a criminal norm.[154]

The SCSL, ECCC, and the ICC are placing much emphasis on human rights law in their decisions to categorise forced marriages as 'other inhumane acts', and as can be seen from the above analysis, this does not comply with the NCSL principle in every respect. If the tribunals and the ICC are to construe provisions in a way which favours the NCSL principle, their decisions must be based on *criminal* norms. Undoubtedly IHRL will continue to be a prominent influence, but to neglect compliance with the NCSL principle so as to align ICL with IHRL is flawed. Going forward, the tribunals and the ICC must use more appropriate reasoning if they are to carry on categorising forced marriages as 'other inhumane acts' or, alternatively, another solution must be found.

6. Concluding remarks

Forced marriages are, indeed, multi-layered crimes. Convicting the perpetrators of forced marriages in armed conflicts and taking steps to end impunity, has been long yearned for at the international criminal tribunals and the ICC, however, the debate as to how forced marriages should be categorised in ICL will continue. The controversial and backward-looking judgment in the *Charles Taylor* case, in which forced marriages were categorised as 'sexual slavery', dismisses the complex nature of the crimes. To interpret forced marriages within the narrow category of 'sexual slavery' does not comply with the NCSL principle as a whole, as forced marriages have materially different elements, and, therefore, is incomplete and inadequate going forward.

The SCSL, ECCC and ICC have adopted a progressive approach in categorising forced marriages as 'other inhumane acts'. The interpretation by the SCSL in the *AFRC* case, the ECCC in *Case 002*, and the ICC in the *Ongwen* case of forced marriages as such is *prima facie* compliant with the NCSL principle, as in the eyes of the judges, the act of forced marriage is of comparable gravity to other crimes against humanity and satisfies the *actus reus* and *mens rea* elements. However, the key inadequacy, is that, in their desire to ensure that grave human rights violations do not go unnoticed, the tribunals and the ICC have neglected to adopt a clear reasoning as to why forced marriages constitute criminal prohibitions capable of being prosecuted on an international level, and in turn, they do not comply with the NCSL principle.

The role of the NCSL principle in ICL is indeed unique, in that judges are continuously faced with the task of balancing the ideals of keeping the law certain and of developing the law. The intent of the

[151] Nicholas Azadi Goodfellow, 'The Miscategorization of "Forced Marriage" as a Crime against Humanity by the Special Court for Sierra Leone', International Criminal Law Review (2011), Vol. 11, p. 855, referencing *Prosecutor v Sam Hinga Norman*, SCSL-2004-14-AR72(E), Special Court for Sierra Leone, Appeals Chamber, Dissenting Opinion by Justice Robertson on Decision on Preliminary Motion Based on Lack of Jurisdiction, 31 May 2004, para 20.

[152] Nicholas Azadi Goodfellow, 'The Miscategorization of "Forced Marriage" as a Crime against Humanity by the Special Court for Sierra Leone', International Criminal Law Review (2011), Vol. 11, p. 854.

[153] Nicholas Azadi Goodfellow, 'The Miscategorization of "Forced Marriage" as a Crime against Humanity by the Special Court for Sierra Leone', International Criminal Law Review (2011), Vol. 11, p. 854.

[154] Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflict*, (Martinus Nijhoff Publishers, 2012), p. 255.

tribunals and the ICC to demonstrate that the act of forced marriage is a particularly heinous crime that should be criminalised in some way is admirable. However, to categorise forced marriages even under 'other inhumane acts' arguably undermines the severity and distinct nature of these acts. Neither the categorisation of forced marriages as 'sexual slavery' nor as 'other inhumane acts' by the SCSL, ECCC and ICC is satisfactory. Forced marriage has a distinct *actus reus* and *mens rea*, and, therefore, if forced marriage was added as a new and distinct crime against humanity in the statutes of any future tribunals and the ICC, judges would be able to develop ICL by aligning it with IHRL without neglecting the NCSL principle.

We continue to see forced marriages occurring across the world, in conflict zones such as Yemen, South Sudan and Syria to name a few. If we are truly committed to punishing perpetrators of gender-based crimes, and in particular forced marriage, then going forward, ICL must not subsume these crimes within categories, but instead must give them the distinct recognition they deserve. It is then, that justice will be served, and victims can find peace.

Competing Interests

The author has no competing interests to declare.

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How to cite this article: Victoria May Kerr, 'Should Forced Marriages be Categorised as 'Sexual Slavery' or 'Other Inhumane Acts' in International Criminal Law?' (2020) 35(1) Utrecht Journal of International and European Law pp. 1–19. DOI: https://doi.org/10.5334/ujiel.473

Submitted: 27 August 2018 **Accepted:** 23 June 2020 **Published:** 23 September 2020

]u[*Utrecht Journal of International and European Law* is a peer-reviewed open access journal published by Ubiquity Press.

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