

Should Human-Rights Treaties Define the International Crime of Forced Marriage?

Julian Rebecca Okeyo

LLB PGCE LLM

*Research Assistant, IRPQP, Rhodes University
Makhanda, South Africa*

<https://orcid.org/0009-0008-7487-9085>

Emma Charlene Lubaale

LLB LLM LLD

*Research Associate, Faculty of Law
Rhodes University, Makhanda, South Africa
University of Greenwich, School of Law and
Criminology, United Kingdom*

<https://orcid.org/0000-0001-8006-2946>

SUMMARY

Forced marriage is an offence not listed as a crime in international criminal law (ICL) statutes. However, various international criminal courts have continued to prosecute individuals for, and convict them of, committing the offence of forced marriage. This raises an unanswered question regarding the principle of legality. This principle is at the centre of criminal justice and critical to the realisation of the accused's right to a fair trial. Article 22 of the Rome Statute embraces the principle of legality by stating that an accused cannot be charged with an act or omission that did not constitute an offence at the time it was committed. Where sexual and gender-based crimes are not proscribed, those accused cannot be charged, which infringes on the rights of women to access justice. Conversely, on account of the principle of legality, if perpetrators are charged and prosecuted when no such crime is proscribed under ICL statutes, the fair-trial rights of the accused are violated as the principle of legality is undermined. It is, however, notable that there are provisions in international human-rights instruments (including article 23(3) of the International Covenant on Civil and Political Rights, and article 16(2) of the Universal Declaration of Human Rights) that prohibit forced marriage. Moreover, in terms of article 21 of the Rome Statute, applicable law before the International Criminal Court (ICC) includes "where appropriate, applicable treaties and the principles and rules of international law". This article assesses whether there is room for recourse to be had to international human-rights law treaties to give meaning to the crime of other inhumane acts for purposes of prosecuting the crime of forced marriage, and what the implications are for the principle of legality.

KEYWORDS: Forced Marriage, Fair Trial, International Criminal Law, International Human Rights Law, Legality

1 INTRODUCTION

Forced marriage has been pervasive in armed conflict, both historically and in present times.¹ As a crime, forced marriage contains three elements: first, force, threat of force or coercion; secondly, a conjugal association; and thirdly, severe suffering, or mental or psychological injury to the victim.² It is a particular form of gender-based crime (GBC) that disproportionately affects women and girls.³ The olden-day Greeks abducted women, turning them into concubines and wives.⁴ In modern-day contemporary armed conflicts, rebel soldiers and cadres abduct young girls and women from their communities, turning them into bush wives against their will.⁵ Women continue to be denied rights relating to marital choice and sexuality.⁶ Despite frequent occurrences of forced marriage in armed conflicts, forced marriage has not been explicitly listed as a crime in the statutes of international criminal tribunals and courts.⁷

It was only after the establishment of the Special Court for Sierra Leone (SCSL)⁸ that forced marriage was recognised and prosecuted as a crime against humanity – in the *Prosecutor v Brima, Kamara & Kanu (AFRC)*⁹ appeals judgment. Later, as a result of the *AFRC* appeals judgment, the SCSL, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Court (ICC) delivered contrasting judgments, prosecuting forced marriage as a crime against humanity, sexual slavery or

¹ Krystalli “Deconstructing the 2012 Human Security Report: Examining Narratives on Wartime Sexual Violence” 2014 69(4) *International Journal: Canada’s Journal of Global Policy Analysis* 574 584; Gill and Anitha *Forced Marriage: Introducing a Social Justice and Human Rights Perspective* (2011) 35.

² Jalloh (ed) *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (2014) 211.

³ See Lindsay (“Lysistrata, Women and War: International Law’s Treatment of Women in Conflict and Post-Conflict Situations” 2005 12 *Texas Wesleyan Law Review* 345 354–355, 357), who refers to the traditional reasoning that “it is bad for (male) morale to see women getting killed on the battlefield”, which “hint[s] at another, more paternalistic justification, which tacitly legitimizes the masculinization of combat – and other military – forces.”

⁴ Homer *The Iliad* (700 to 750 BC) and Higgins *The Iliad and What It Can Still Tell Us About War* (30 January 2010) <https://www.theguardian.com/books/2010/jan/30/iliad-war-charlotte-higgins> (accessed 2022-10-12).

⁵ Haenen “The Parameters of Enslavement and the Act of Forced Marriage” 2013 13 *International Criminal Law Review* 895 895.

⁶ Thiara, Condon and Schrötle (eds) *Violence Against Women and Ethnicity: Commonalities and Differences Across Europe* (2011) 244.

⁷ *Law on the Establishment of the Extraordinary Chambers NS/RKM/1004/006* (as amended 27 October 2004); *Statute of the Special Court for Sierra Leone (SCSL)* 2178 UNTS 138 UN Doc S/2002/246 (16 January 2002) (SCSL Statute); and UNGA *Rome Statute of the International Criminal Court (ICC)* 2187 UNTS 90 (17 July 1998) (last amended 2010) (Rome Statute) art 7.

⁸ SCSL Statute.

⁹ SCSL Appeals Chamber Case No SCSL-2004-16-A (22 February 2008) (*AFRC* case) par 199–203.

enslavement crimes.¹⁰ Forced marriage was adjudicated under the Rome Statute (governing the ICC) as an inhumane act under crimes against humanity in *Prosecutor v Dominic Ongwen (Ongwen)*¹¹ and *Prosecutor v Al Hassan Ag Abdoul Ag Mohammed*,¹² and as a sexual-slavery or conjugal-slavery crime in *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*.¹³ Apart from the AFRC appeals case, forced marriage was also prosecuted by the SCSL in *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF)*¹⁴ as an inhumane act under crimes against humanity. In both the AFRC trial judgment case and *Prosecutor v Charles Ghankay Taylor*,¹⁵ forced marriage was considered a sexual-slavery crime under the SCSL Statute. In the ECCC, forced marriage was prosecuted as an inhumane act that was a crime against humanity in *Prosecutor v Nuon Chea and Khieu Samphan*¹⁶ under the ECCC Statute.¹⁷ However, these contrasting judgments bring to the fore the question of adherence to the principle of legality because forced marriage is not codified under the international criminal law (ICL) statutes, including the ECCC, the SCSL and the Rome Statute establishing the ICC.

When prosecuting an uncodified crime such as forced marriage, the issue arises as to whether international courts and tribunals comply with the principle of legality when they use human-rights instruments to hold individuals criminally responsible for forced marriage, since the crime of forced marriage is not defined or listed as a crime in any ICL statute. This article seeks to resolve this issue. It does so by unpacking the principle of legality and then examining the cases where courts have relied on international human-rights law (IHRL) to define forced marriage. After examining these cases, the article assesses whether such an approach is in line with the principle of legality. The article is divided as follows. After this introduction follows a discussion on the principle of legality. The third section argues that categorising forced marriage as an inhumane act under ICL undermines the principle of legality. The fourth section unpacks the right to freedom from forced marriage under IHRL. The fifth section examines cases from the ECCC, the International Criminal Tribunal for the former Yugoslavia (ICTY), the ICC and the SCSL, in which recourse was had to IHRL to define forced marriage as a crime. This discussion is followed by an assessment of such case law in section six in relation to its adherence to the legality principle. The seventh section engages with the implication of this posture for an accused's right to a fair trial, and the last section is the conclusion, which highlights the salient features of the discussion.

¹⁰ See footnotes below.

¹¹ Trial Judgment ICC-02/04-01/15-1762 ICC (4 February 2021).

¹² Case Information Sheet ICC-01/12-01/18 ICC (February 2022).

¹³ Decision on the Confirmation of Charges ICC-01/04-01/07 ICC (30 September 2008) par 431; *Prosecutor v Katanga and Chui* ICC-01/04-01/07 OA 8 ICC (25 September 2009).

¹⁴ Appeal Judgment Case No SCSL-04-15-A (26 October 2009).

¹⁵ Judgment Summary Case No SCSL-03-1-T SCSL (26 April 2012).

¹⁶ Judgment Case 002/02, 002/19-09-2007/ECCC/TC (16 November 2018); *Prosecutor v Chea and Samphan Khieu* Samphan's Closing Brief 002/02 Case No 002/19-09-2007/ECCC/TC (25 March 2019); *Prosecutor v Chea and Samphan* Closing Order Indictment Case No 002/19-09-2007/ECCC/OCIJ (15 September 2010).

¹⁷ ECCC Statute.

2 UNDERSTANDING THE *NULLUM CRIMEN SINE LEGE* PRINCIPLE OF LEGALITY

Insofar as the prosecution of international crimes is concerned, the *nullum crimen sine lege* principle came to the fore during the World War II Tokyo and Nuremberg tribunals.¹⁸ The accused at the Tokyo and Nuremberg tribunals raised objections to being prosecuted for the crime of waging aggressive war notwithstanding that aggressive war was not considered a crime at the time of its commission.¹⁹ The Nuremberg International Military Tribunal (IMT) objected to the defendants' claim and merely stated: "the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice."²⁰ This meant that the Nuremberg and Tokyo tribunals were not bound by the *nullum crimen sine lege* doctrine at the time of the judicial proceedings against World-War-II accused.

Over the years, the principle of legality has developed and become entrenched in international law, becoming a fundamental element underpinning ICL and a central theme in the Rome Statute establishing the ICC.²¹ This principle finds application in ICL under article 22 of the Rome Statute,²² which 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."

Various IHRL instruments entrench this principle in definite terms; these include the Universal Declaration of Human Rights (UDHR),²³ the International Covenant on Civil and Political Rights (ICCPR),²⁴ the UN Convention on the Rights of the Child (UNCRC),²⁵ the European Convention on Human Rights (ECHR),²⁶ the African Charter on Human and Peoples' Rights (ACHPR),²⁷ the revised Arab Charter on Human Rights (ArCHR)²⁸

¹⁸ Mokhtar "Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects" 2005 26 *Statute Law Review* 41 52–52.

¹⁹ *IMT Nuremberg Trial* Vol 1 298–301 (Frick), 304–07 (Funk), 310–15 (Dönitz), 327–30 (Seyss-Inquart), IMTFE Tokyo Records (12 November 1948) Vol 22 48437–48439.

²⁰ Acquaviva "Doubts About *Nullum Crimen* and Superior Orders: Language Discrepancies in the Nuremberg Judgment and Their Significance" in Bergsmo, Wui Ling and Ping (eds) *Historical Origins of International Criminal Law* (2014) 602.

²¹ Art 22 of the Rome Statute.

²² Art 22(2) of the Rome Statute.

²³ UNGA *Universal Declaration of Human Rights* (10 December 1948) art 11(2).

²⁴ UNGA *International Covenant on Civil and Political Rights* 999 UNTS 17 (1966). Adopted: 16/12/1966; EIF: 23/03/1976 art 15.

²⁵ UNGA *Convention on the Rights of the Child* 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990 art 40(2)(a).

²⁶ Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950) art 7(1) and (2).

²⁷ Organisation of African Unity *African Charter on Human and Peoples' Rights* CAB/LEG/67/3 rev 5, 21 ILM 58 (1982). Adopted: 27/06/1981; EIF: 21/10/1986 (Banjul Charter) art 7(2) and 9.

and the American Convention on Human Rights.²⁹ The Latin expression for the principle of legality is *nullum crimen nulla poena sine lege*.³⁰ This principle emphasises that an individual should not be punished for conduct that lacks a clear legal definition as a crime.³¹ This simply means that a defendant cannot be “prosecuted for acts that were not explicitly prohibited by law at the time they occurred”.³²

Moreover, as can be seen from its entrenchment in article 22 of the Rome Statute, the principle prohibits the interpretation of existing crimes in a manner that extends them by analogy. One can therefore glean that the principle of legality serves to protect the accused from arbitrary prosecutions that lead to unfair trials.³³ If an accused knows that their conduct is prohibited by the law, then the accused can anticipate being punished by the same law that they violate.³⁴ Therefore, “a chamber should construe a provision in a manner that favours respect for the principle of legality, to the extent this is possible.”³⁵ It has been argued that “the principle of legality imposes on criminal judges a duty of interpretative restraint and significantly limits the scope for dynamic interpretation to the detriment of an accused.”³⁶

It is thus abundantly clear that the law needs to be clearly defined, accessible and foreseeable. Moreover, eventual shortcomings in codified provisions of an ICL statute cannot be fixed by judges on the bench. This is not the court’s responsibility. Any attempt by courts or tribunals to include crimes that drafters of ICL statutes did not initially envisage may breach the principle of legality. For purposes of the discussions in this article, an issue that is yet to be resolved is whether having recourse to IHRL to give meaning to crimes under the Rome Statute is in line with the principle of legality. The starting point to such a quest is understanding what forced marriage looks like in terms of IHRL and the nature of obligations that IHRL imposes.

3 FORCED MARRIAGE AS AN INHUMANE ACT UNDER CRIMES AGAINST HUMANITY

The crime “inhumane acts” under article 7 of the Rome Statute encompasses acts that inflict severe suffering or serious injury on a victim.³⁷

²⁸ League of Arab States *Arab Charter on Human Rights* 12 Int'l Hum. Rts. Rep. 893 (2005). Adopted: 22/05/2004; EIF: 15/03/2008 art 15.

²⁹ Organization of American States *American Convention on Human Rights*, “Pact of San Jose”, Costa Rica. Adopted: 22/11/1969; EIF: 18/07/1978 art 9.

³⁰ “No crime without the law.” See Stahn *A Critical Introduction to International Criminal Law* (2019) 10.

³¹ Art 22 of the Rome Statute.

³² Paust “It’s No Defense: *Nullem Crimen*, International Crime and the Gingerbread Man” 1997 60 *Albany Law Review* 657.

³³ Cassese *International Criminal Law* (2003) 147 and Stahn *A Critical Introduction to International Criminal Law* 11–12.

³⁴ Cassese *International Criminal Law* 147–149.

³⁵ Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010) 407.

³⁶ Grabert *Dynamic Interpretation in International Criminal Law: Striking a Balance Between Stability and Change* (2015) 12.

³⁷ Art 7(1)(k) of the Rome Statute.

Certain characteristics of forced marriage align with the elements of inhumane acts owing to its nature. Forced marriage features severity, duration, and intent to inflict suffering in common with an inhumane act.³⁸ It also involves physical or psychological violence, confinement and deprivation of liberty for a prolonged period.³⁹ This intentional act inflicts great suffering, both physical and mental, on the victim.⁴⁰ The victim's autonomy and dignity are severely compromised, amounting to lasting mental and emotional harm.⁴¹ These elements mirror the suffering inflicted through acts deemed inhumane under the Rome Statute.⁴² The *AFRC* appeals judgment categorised forced marriage as "other inhumane acts".⁴³ In reaching this decision, the court focused on the non-consensual harm of forced marriage that "resulted in great suffering, or serious physical or mental injury on the part of the victim".⁴⁴ This approach taken by the *AFRC* Appeals Chamber was affirmed by the ICC Pre-Trial Chamber in *Ongwen*.⁴⁵ The ICC Pre-Trial Chamber stated that forced marriage amounted to "other inhumane acts" because an inhumane act must "intentionally cause great suffering, or serious injury to body or to mental or physical health".⁴⁶

Moreover, mirroring the elements of "inhumane acts", forced marriage also violates a range of fundamental human rights. These include the right to marry freely,⁴⁷ the right to freedom from torture and cruel, inhuman or degrading treatment,⁴⁸ and the right to security of the person.⁴⁹ Although forced marriage undeniably constitutes an inhumane act, forced marriage has elements broader than those captured by other inhumane acts. The *SCSL* Appeals Chamber elaborated on the elements of forced marriage, which involves:

"a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim.

Second, (...) forced marriage implies a relationship of exclusivity between the 'husband' and 'wife', which could lead to disciplinary consequences for breach of this exclusive arrangement."⁵⁰

Therefore, the crime of forced marriage contains three elements: first, force, threat of force or coercion; secondly, a conjugal association; and thirdly, severe suffering, or mental or psychological injury to the victim.⁵¹ The

³⁸ *Ibid.*

³⁹ *AFRC* Appeals Chamber par 195.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Art 7(1)(k) of the Rome Statute.

⁴³ *AFRC* Appeals Chamber par 202.

⁴⁴ *AFRC* Appeals Chamber par 195.

⁴⁵ *Ongwen* Decision on the Confirmation of Charges ICC (23 March 2016) par 88, 89–92.

⁴⁶ *Ibid.*

⁴⁷ Art 16 of the UDHR.

⁴⁸ Art 7 of the ICCPR.

⁴⁹ Art 3 of the ECHR.

⁵⁰ *AFRC* Appeals Chamber par 195.

⁵¹ Jalloh *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* 211.

elements of forced marriage highlight that forced marriage is not merely about inflicting suffering, but comprises an entire surrounding coercive system.

In addition, the principle of legality (*nullum crimen sine lege*) is no doubt crucial in ICL.⁵² However, international courts and tribunals have a responsibility to interpret the law in a way that is both effective and respects the principle.⁵³ While the “inhumane acts” provision is broad, courts simply focus on acts that inflict severe suffering or serious injury, which forced marriage causes.⁵⁴ The *AFRC* Appeals Chamber emphasised that forced marriage definitely causes severe suffering or serious injury, which constitutes an inhumane act.⁵⁵ Furthermore, it could be deduced that the notion of physical or mental suffering is seemingly wide enough to cover a wide range of atrocious conduct committed during armed conflict, including forced marriage.

It must, however, be recalled that the principle of legality entails, among other things, precision.⁵⁶ Vagueness, omnibus or catch-all provisions can generally be said to fall foul of the principle of legality. In the words of Galand, the principle of legality demands “clarity, precision, certainty and specificity”.⁵⁷ While the crime “other inhumane acts” is very broad, covering everything involving suffering, including forced marriage, such wideness and vagueness goes against the principle of legality, which demands specificity and certainty. Therefore, recognising forced marriage as an act analogous to inhumane acts undermines the *nullum crimen sine lege* principle. Compliance with this principle also ensures legal clarity concerning the prosecution of serious violations of human dignity under ICL.

4 FORCED MARRIAGE UNDER INTERNATIONAL-HUMAN-RIGHTS LAW

Various human-rights treaties guarantee the right to freedom from forced marriage. For example, article 23(3) of the ICCPR provides that no marriage shall be entered into without the free and full consent of the intending spouses. These same principles are enshrined in the UDHR,⁵⁸ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁵⁹ and the International Covenant on Economic, Social and

⁵² Art 22 of the Rome Statute.

⁵³ *Prosecutor v Sam Hinga Norman* Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) Case No 2004-14-AR72(E) SCSL Appeals Chamber (21 May 2004) par 2.

⁵⁴ *AFRC* Appeals Chamber par 195; *Ongwen* Decision on the Confirmation of Charges ICC (23 March 2016) par 88, 89–92; *Prosecutor v Chea and Samphan* Closing Order Indictment ECCC (15 September 2010) par 1443.

⁵⁵ *AFRC* Appeals Chamber par 195–203.

⁵⁶ Grabert *Dynamic Interpretation in International Criminal Law: Striking a Balance Between Stability and Change* 11.

⁵⁷ Galand “Article 13(b) vs Principle of Legality” in Galand *UN Security Council Referrals to the International Criminal Court*. Vol 5 (2019) 110.

⁵⁸ Art 16(2) of the UDHR.

⁵⁹ *UNGA Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) 1249 UNTS 13. Adopted: 18/12/1979; EIF: 1/09/1981 art 5(1), 6(a), 7 and 16.

Cultural Rights (ICESCR).⁶⁰ Article 1(1) of the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage goes further than the ICCPR, by stating:

“[N]o marriage shall be legally entered into without the free and full consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnise the marriage and of witnesses as prescribed by law.”⁶¹

Also relevant are regional treaties that forbid forced marriages, including article 18(3) of the ACHPR (Banjul Charter) and articles 32 and 37 of the Istanbul Convention.⁶²

All such principles, entrenched in these human-rights treaties and conventions, highlight: first, that forced marriage is a union between individuals,⁶³ in which one party has not given consent to marry; and secondly, that forced marriage involves elements of coercion.⁶⁴ It should be noted that forced marriage in human-rights law is an unacceptable practice and a violation of human rights, hence the need for human-rights instruments calling on states to forbid the practice of forced marriage. However, human-rights treaties do not establish individual criminal responsibility for forced marriage. Justice Sebutinde pointed this out in the *AFRC* case by stating:

“From the opinion of both Experts, it is clear that in understanding and characterising the phenomenon of ‘forced marriage’ in the Sierra Leone conflict, a clear distinction should be drawn between traditional or religious marital unions involving minors (early or arranged marriages), during times of peace; and the forceful abduction and holding in captivity of women and girls (‘bush wives’) against their will, for purposes of sexual gratification of their ‘bush husbands’ and for gender-specific forms of labour including cooking, cleaning, washing clothes (conjugal duties). In my view, while the former [early or arranged marriages] is proscribed as a violation of human rights under international human rights instruments of treaties like CEDAW, it is not recognised as a crime in International Humanitarian law. The latter conduct [bush wives] on the other hand, is clearly criminal in nature and is liable to attract prosecution.”⁶⁵

Therefore, forced marriage cannot be prosecuted as a crime that violates “human-rights law”. Despite the assertion that forced marriage is merely “prohibited” in IHRL, international courts and tribunals have continuously danced between IHRL and ICL, continuously forgetting that these are two distinct areas of law. IHRL and ICL function together in international law but

⁶⁰ UNGA *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 993 UNTS 3. Adopted: 16/12/1966; EIF: 03/01/1976 art 10.

⁶¹ UNGA *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* 521 UNTS 231. Adopted: 07/11/1962; EIF: 09/12/1964 art 1(1).

⁶² Council of Europe *Convention on Preventing and Combating Violence Against Women and Domestic Violence* (Istanbul Convention) (11 May 2011).

⁶³ Chantler “Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse” 2012 13 *Trauma, Violence & Abuse* 176 176.

⁶⁴ *Ibid.*

⁶⁵ *AFRC* Trial Judgment Separate Concurring Opinion of the Hon Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88(C) par 12.

are not synonymous. There have been historical examples where prohibited acts in human rights evolve into ICL crimes.

Torture, once a common practice used by governments to extract information from criminals,⁶⁶ was prohibited by customary international law after World War II.⁶⁷ The Convention Against Torture, adopted in 1984,⁶⁸ further solidified the prohibition against torture and established a legal mechanism to prevent torture, investigate allegations, and prosecute those responsible.⁶⁹ This conduct is further criminalised under various ICL statutes.⁷⁰ Similarly, the concept of genocide emerged in response to crimes committed during World War II.⁷¹ The Genocide Convention⁷² defined genocide as a specific crime against humanity and formulated a regulatory framework holding individuals accountable.⁷³ Nonetheless, in recent years, with international tribunals adjudicating torture and genocide, these crimes have solidly become crimes under ICL, even being added to the Rome Statute.⁷⁴ However, where an act is not stipulated as a criminal offence, according to the principle of legality, the courts have no latitude to create a new offence simply because an act is proscribed in human-rights law.

In the absence of an explicit codification of the crime of forced marriage, various international courts and tribunals have had recourse to IHRL, giving meaningful content to “other inhumane acts” by incorporating forced marriage. Again, this extended interpretation brings sharply into focus the principle of legality. It must be noted that inhumane acts find their roots in human-rights law; thus, it makes sense for courts to have recourse to human-rights treaties. Moreover, the Rome Statute allows the ICC to refer to human-rights treaties in interpreting the Rome Statute.⁷⁵ However, it must be asked whether courts may, under article 22 of the Rome Statute, simply

⁶⁶ Bassiouni *Crimes Against Humanity: Historical Evolution and Contemporary Application* (2011) 411–412, 419; Hope “Torture” 2004 53 *International and Comparative Law Quarterly* 807 809–810, 823; see also Strauss “Torture” 2003 48 *New York Law School Law Review* 201 252 fn 183.

⁶⁷ Bassiouni *Crimes Against Humanity* 421–422. See also Simon “Iconography of Torture: Going Beyond the Tortuous Torture Debate” 2014 43 *Journal of International Law and Policy* 45 86; Grodin and Annas “Physicians and Torture: Lessons from the Nazi Doctors” 2007 89 *International Review of the Red Cross* 635 636, 651–654 and Hoffman “Nazi War Crimes and Criminals” 1946 23 *Dicta* 30 30–31.

⁶⁸ UNGA *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* UN Doc A/39/51 (1984) draft reprinted in 23 ILM 1027 (1985), with final changes in 24 ILM 1027. Adopted: 10/12/1984; EIF: 26/06/1987. The Convention defines torture and obligates states to prevent it, investigate allegations, and prosecute those responsible.

⁶⁹ *Ibid.*

⁷⁰ ECCC Statute art 3, 5 and 6; Rome Statute art 7(1)(f) and 8(2)(a)(ii); SCSL Statute art 2(f).

⁷¹ Lewis “The Namibian Holocaust: Genocide Ignored, History Repeated, Yet Reparations Denied” 2017 29 *Florida Journal of International Law* 133 134 and 136. Crimes committed during the World War II Holocaust tragedy highlighted the need for legal measures against genocide to prevent such atrocities from taking place (Alston “International Legal Responses to the Holocaust and Genocide After Nuremberg” 1988 8 *Boston College Third World Law* 47 51 53–56).

⁷² UNGA *Convention on the Prevention and Punishment of the Crime of Genocide* 78 UNTS 277. Adopted: 09/12/1948; EIF: 12/01/1951.

⁷³ *Ibid.*

⁷⁴ Art 6 and 7(f) of the Rome Statute.

⁷⁵ Art 21(1) of the Rome Statute.

bypass the principle of legality, which, as consistently noted, informs the accused's right to a fair trial. The next part discusses how courts have ignored the principle of legality by using IHRL to ascribe definitions to the crime of forced marriage, allowing it to pass the *nullum crimen sine lege* test by classifying it as a crime against humanity.

5 USING IHRL TREATIES TO DEFINE CRIMES UNDER ICL STATUTES

There are a number of cases where courts have relied on IHRL instruments to interpret forced marriage as being other inhumane acts, sexual slavery or enslavement. For instance, the case of *Prosecutor v Dominic Ongwen*⁷⁶ recognised forced marriage as a separate crime against humanity. Ongwen, a former commander of the Sinia Brigade within the Ugandan rebel group, the Lord's Resistance Army (LRA), abducted civilian women and girls between the ages of 7 and 20 years, forcing them to marry LRA fighters.⁷⁷ When women and girls were abducted, they felt obliged to accept the LRA soldier's request to stay in his household as "wives".⁷⁸ Sometimes, women would be raped at gunpoint by rebel LRA soldiers.⁷⁹ Moreover, "wives" were forced to cook, collect food, fetch water, fetch and chop wood, cut grass for bedding, and do the washing.⁸⁰ Ongwen ordered, oversaw, controlled, coordinated and directly participated in the illegal acts of forced marriage.⁸¹ When adjudicating the case, the ICC Pre-Trial Chamber based the inclusion of forced marriage in the crime of inhumane acts on the UDHR, General Comment 28 of the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), CEDAW, the Protocol to the ACHPR on the Rights of Women in Africa (better known as the Maputo Protocol), the ECHR, the UIDHR,⁸² ArCHR and the Report of the United Nations High Commissioner of Human Rights,⁸³ all of which expressly provide that marriage should be entered into with consent. Moreover, the ICC maintained that forced marriage caused harm such as forcing the victim against her will to enter into a conjugal union as well as creating social stigma.⁸⁴ The harm was mental trauma in depriving the victim of the will to choose their own spouse as well as an attack on the victim's dignity.⁸⁵ Therefore, according to the ICC, forced marriages constituted inhumane acts in terms of article 7(1)(k) of the Rome Statute.⁸⁶

⁷⁶ *Ongwen* Public Redacted Trial Judgment (4 February 2021).

⁷⁷ *Ongwen* Trial Judgment par 187, 417, 418, 2094, 2138, 2149, 2151, 2211, 2212, 2263.

⁷⁸ *Ongwen* Trial Judgment par 2218, 2235, 3031.

⁷⁹ *Ongwen* Trial Judgment par 2046, 2058.

⁸⁰ *Ongwen* Decision on the Confirmation of Charges par 92.

⁸¹ *Ongwen* Decision on the Confirmation of Charges par 4 and 34.

⁸² Islamic Council *Universal Islamic Declaration of Human Rights*. Adopted: 12/04/1980 EIF: 19/09/1981/21 *Dhul Qaidah 1401* art 19(i).

⁸³ Human Rights Council, *Report of the United Nations High Commissioner of Human Rights on Child, early and forced marriage in humanitarian settings A/HRC/41/19* EIF: 29/04/2019 par 4.

⁸⁴ *Ongwen* Trial Judgment par 2748.

⁸⁵ *Ibid.*

⁸⁶ *Ongwen* Trial Judgment par 3021; Rome Statute art 7(1)(k).

Forced marriage was also in focus in *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Katanga and Chui)*.⁸⁷ Katanga and Chui were former Congolese militia leaders – Katanga of the Force Patriotique de l'Ituri (FRPI) and Chui of the Front des Nationalistes et Intégrationnistes (FNI).⁸⁸ Katanga and Chui commanded the FRPI and the FNI to abduct, sexually enslave, and physically abuse women in Ituri, the Eastern side of the Democratic Republic of Congo (DRC).⁸⁹ The ICC Pre-Trial Chamber referred to IHRL instruments such as the Supplementary Convention on the Abolition of Slavery and Institutions and Practices Similar to Slavery of 1956,⁹⁰ which describes giving a woman in marriage on payment as a practice similar to slavery.⁹¹ The Pre-Trial Chamber maintained that sexual slavery involves similar situations where “women and girls were forced into marriage, domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors.”⁹² Therefore, the Pre-Trial Chamber concluded that forced marriage acts committed by Katanga and Chui were akin to sexual slavery.⁹³ It seemed that the ICC in *Katanga and Chui* declined to consider forced marriage as a separate crime on its own grounds.

The SCSL dealt with similar issues to the ICC in *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu (AFRC)*.⁹⁴ Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu were senior members of the Armed Forces Revolutionary Council's (AFRC) Supreme Council (the highest decision-making body of the AFRC) during the Sierra Leonian Civil War.⁹⁵ The AFRC then joined forces with the Revolutionary United Front (RUF) from 1997 to 1999.⁹⁶ Under Brima, Kamara and Kanu's leadership, women and girls throughout Sierra Leone were continuously abducted by the RUF/AFRC rebels, kept in camps to be forcibly married, sexually enslaved and raped.⁹⁷ These abducted women and girls were assigned to rebels and rebel commanders as “wives” and became known as “bush wives”.⁹⁸ The bush wives were expected to submit to their husbands by satisfying the rebel “husbands” sexually, carrying out forced labour during their captivity including cooking, cleaning, washing clothes, bearing children and carrying ammunition and looted items.⁹⁹ There were no official

⁸⁷ Case No ICC-01/04-01/07 OA 8 (25 September 2009).

⁸⁸ *Katanga and Chui* Decision on the Confirmation of Charges ICC 30 September 2008 par 7 and 10. Katanga oversaw the Force Patriotique de l'Ituri (FRPI) and Chui oversaw the Front des Nationalistes et Intégrationnistes (FNI) led by Thomas Lubanga.

⁸⁹ *Katanga and Chui* Decision on the Confirmation of Charges par 25–29; *Prosecutor v Katanga* Case Information Sheet ICC (July 2021).

⁹⁰ UN Economic and Social Council *Supplementary Convention on the Abolition of Slavery and Institutions and Practices Similar to Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*. Adopted: 07/09/1956; EIF: 30/04/1957.

⁹¹ *Katanga and Chui* Decision on the Confirmation of Charges par 430.

⁹² *Katanga and Chui* Decision on the Confirmation of Charges par 431.

⁹³ *Katanga and Chui* Decision on the Confirmation of Charges par 25–28, 431 and 434–435.

⁹⁴ *AFRC* Trial Judgment (20 June 2007) and *AFRC* Appeals Judgment (22 February 2008).

⁹⁵ *AFRC* Trial Judgment par 11–13.

⁹⁶ *Ibid.*

⁹⁷ Human Rights Watch *We'll Kill You If You Cry* (January 2003) 42–43; *Samura Cry Freetown* (2000) Sierra Leone.

⁹⁸ *AFRC* Trial Judgment par 12.

⁹⁹ Human Rights Watch *We'll Kill You If You Cry* 43.

ceremonies for women to get married to rebels. These women and girls were simply bestowed the title “wife”. Rebels also frequently changed their bush wives when they got bored or when the wives got ill and were unable to perform their tasks.¹⁰⁰ Justice Julia Sebutinde in her separate concurring opinion referred to IHRL instruments including the UDHR, CEDAW and the Maputo Protocol to establish forced marriage as prohibited conduct that falls under the purview of other inhumane acts.¹⁰¹ She stated that forced marriage, involving the abduction and detention of women and girls and their use for sexual and other purposes, is a violation of IHRL instruments.¹⁰² However, Justice Sebutinde strongly maintained that forced marriage is not recognised as a crime under ICL statutes.¹⁰³ Her approach to forced marriage was different to that of the *AFRC* Trial Chamber, which prosecuted forced marriage as sexual slavery.¹⁰⁴

In all of the above discussion, it flows logically for the ICC and SCSL to use human-rights treaties to draw the conclusion that forced marriage is either a sexual-slavery crime or an inhumane act. In international law, IHRL is the only area of law that explicitly prohibits forced marriage – unlike domestic jurisdictions, which use their own criminal laws to prosecute forced marriages. This is the reason that Justice Sebutinde in *AFRC* asserted that human-rights law only prohibits forced marriage but does not assign criminal responsibility for forced marriage.

6 ANALYSIS OF CASE LAW IN WHICH RECOURSE HAS BEEN HAD TO IHRL

It seems that, rather than using ICL statutes in and of themselves, or applying their minds to the *actus rea* and *mens rea* elements of sexual slavery and other inhumane acts, courts and tribunals have turned to IHRL instruments to conclude that forced marriage is a crime against humanity or a sexual-slavery crime. However, relying on human-rights treaties that are often not precise, and can be too broad or narrow, to interpret criminal acts such as sexual slavery and other inhumane acts violates the prohibition against extending crimes by analogy.

As discussed above, IHRL can only prohibit illegal conduct but does not assign criminal liability. IHRL and ICL are two distinct areas of law; they function together but are not synonymous. Prohibited acts in human rights may indeed end up being recognised as criminal conduct in criminal law but in the absence of a criminalising law, human-rights violations remain merely prohibitions and not a basis for individual criminal responsibility. Thus, by using IHRL treaties, which are far from precise, as a method to interpret

¹⁰⁰ *Ibid.*

¹⁰¹ *Ongwen* Public Redacted Trial Judgment par 2748; *AFRC* Trial Judgment Case No SCSL-04-16-T Separate Concurring Opinion of the Hon Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88(C) par 12.

¹⁰² See *AFRC* Trial Judgment Separate Concurring Opinion of the Hon Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88(C) par 12.

¹⁰³ *Ibid.*

¹⁰⁴ *AFRC* Trial Judgment par 713.

conduct as criminal, courts are inadvertently violating the *nullum crimen sine lege scripta* principle.

Suffice it to note that the crimes featured under article 7 of the Rome Statute, including other inhumane acts, have been forbidden and such prohibition is embodied in the UDHR and the ICCPR. It would therefore seemingly make sense for recourse to be had to IHRL treaties to give meaningful content to these crimes. The link between human-rights violations and these crimes can be traced back to World War II. Before and during World War II, certain human-rights violations were committed against the civilian population on a widespread or systematic basis. As a result, the category “other inhumane acts” was created.¹⁰⁵ After World War II, the drafters of the Nuremberg Charter¹⁰⁶ agreed to include this category in article 6 of the Nuremberg Charter.¹⁰⁷ This was the first international document to criminalise certain human-rights violations of World War II; “other inhumane acts” was included as a residual category to catch all new international crimes committed during and after World War II.¹⁰⁸ Schabas notes that the crimes listed under crimes against humanity, including other inhumane acts, might be:

“an implementation of human rights norms within international criminal law. Just as human rights law addresses atrocities and other violations perpetrated by a State against its own population, crimes against humanity are focused on prosecuting the individuals who commit such violations.”¹⁰⁹

Undoubtedly, conduct prohibited in IHRL instruments solidifies proscribed conduct under ICL statutes. In fact, general principles of human rights have heavily informed the Rome Statute and its Elements of Crimes document insofar as these crimes are concerned. Be that as it may, to rely on IHRL instruments is to fill in careless gaps left in ICL statutes and, by implication, to extend existing crimes by analogy.

It may be argued, in response, that article 21 of the Rome Statute gives the ICC latitude to have recourse to IHRL treaties to give meaningful content to existing crimes. To circumvent the issue of legality, the ICC has seemingly used IHRL treaties to find sufficient evidence to place forced marriages under crimes against humanity. Article 21(1) of the Rome Statute provides:

“The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.”

¹⁰⁵ Bassiouni *Crimes Against Humanity in International Criminal Law* 32 and 95.

¹⁰⁶ United Kingdom of Great Britain and Northern Ireland, United States of America, France and Union of Soviet Socialist Republics *Charter of the International Military Tribunal: Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (8 August 1945) (Nuremberg Charter).

¹⁰⁷ Art 6(c) of the Nuremberg Charter.

¹⁰⁸ *Ibid.* Bassiouni *Crimes Against Humanity: Historical Evolution and Contemporary Application* 213–214.

¹⁰⁹ Schabas *The International Criminal Court: A Commentary on the Rome Statute* 139.

This highlights that ICL has a hierarchy, and that the first point of reference for the ICC insofar as crimes under the ICC jurisdiction is concerned is articles 5, 6, 7 and 8 of the Rome Statute, which categorise crimes within the court's jurisdiction. The second point of reference in terms of article 21(1)(b), "where appropriate", is treaties, which in this instance include IHRL treaties. Emphasis here is to be placed on the term "where appropriate". Thus, reference to other sources outside the Rome Statute can only be made "where appropriate". If referring to IHRL treaties to define crimes not listed under the Rome Statute would amount to extending crimes by analogy, it is hard to argue that doing so is "appropriate" because such action has the effect of undermining the accused person's right to a fair trial, which is a fundamental human right of accused persons, and is entrenched in strong terms under human-rights law. Emphasis here is also to be placed on article 21(3), which stipulates:

"The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."¹¹⁰

Extending the definition of crimes under the Rome Statute through reference to other treaties is hardly consistent with internationally recognised human rights. In the case of *Ongwen*, which is discussed in detail in the next section, for the ICC to use IHRL treaties such as CEDAW to find suitable elements to classify forced marriages as "other inhumane acts", by itself can be construed as undermining the *nullum crime sine lege scripta* principle and can in no way be said to be consistent with internationally recognised human rights. As consistently underscored, IHRL does not create individual criminal responsibility for crimes; so, for a court to use treaties such as CEDAW or the UDHR in *Ongwen* to interpret forced marriages as other inhumane acts runs the risk of extending crimes by analogy.

From article 21(1)(b), one gathers that recourse to treaties, including IHRL treaties is envisaged. It may be argued that such application allows courts to have recourse to IHRL treaties to define crimes under the Rome Statute. While this may be a logical view, article 21(1)(b) has to be applied in light of article 22 of the Rome Statute, which mandates the ICC to interpret crimes in the Rome Statute strictly and not to extend them by analogy. Thus, IHRL treaties are applicable to the extent that their application does not transgress the legality principle as buttressed in article 22. It may not have been the intention of the drafters of the Rome Statute to have IHRL treaties applied in a manner that extends crimes by analogy or defies the requirement of a strict interpretation of crimes. If the opposite were true (and crimes were allowed to be extended using other instruments such as treaties), what then would be the essence of having a provision that guards against extending existing crimes by analogy?

Undoubtedly, and as consistently noted, there have been decisions where tribunals and the ICC have deliberately defined other inhumane acts using

¹¹⁰ Art 21(3) of the Rome Statute.

IHRL treaties. In *Prosecutor v Kuprěškić*,¹¹¹ the ICTY stated that IHRL treaties can be used to define specifically what amounts to “other inhumane acts”.¹¹² The ICTY Trial Chamber found that treaties such as the UDHR, the ICCPR, the ECHR, the Inter-American Convention on Human Rights and the 1984 Convention Against Torture can be used to interpret prohibited acts in human-rights law that amount to other inhumane acts.¹¹³ When reviewing these treaties, the ICTY recognised that:

“drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity.”¹¹⁴

According to the ICC in *Katanga and Chui*, the Pre-Trial Chamber endorsed the approach of relying on external sources such as IHRL treaties to clarify the definitions of prohibited acts under other inhumane acts.¹¹⁵ The Pre-Trial Chamber stated:

“In the view of the Chamber, in accordance with article 7(l)(k) of the Statute and the principle of *nullum crimen sine lege* pursuant to article 22 of the Statute, inhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute.”¹¹⁶

In summary, the *Katanga and Chui* Pre-Trial Chamber considered other inhumane acts to be serious violations of IHRL norms. It is submitted that this approach is problematic, simply because the field of law that the courts are dealing with – criminal law – is an area subject to strict procedural guarantees such as the principle of legality. Based on this principle, if crimes are not precisely defined by the operating criminal statute, no such crime can be deemed to exist despite a prohibition elsewhere. Although other sources can be used to clarify, these other sources cannot be a basis for unpacking the elements of these crimes. Thus, perhaps the oversight in all the ICL statutes is the failure to recognise the high threshold of procedure within which ICL operates. Leaving crimes undefined under these statutes might have been a strategy to leave room for the development of crimes under ICL jurisprudence. However, with it came gaps of precision and specificity that go directly to the heart of the principle of legality – an overarching principle in ICL.

7 RECOURSE TO IHRL TREATIES: A VIOLATION OF THE ACCUSED’S RIGHT TO A FAIR TRIAL

It may be hard to imagine that recourse to human-rights treaties could in fact result in a human-rights violation. Such a situation becomes a reality when,

¹¹¹ Judgment Case No IT-95-16-T ICTY (14 January 2000).

¹¹² *Prosecutor v Kuprěškić* Judgment *supra* par 566.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Katanga and Chui* Decision on the Confirmation of Charges par 448.

¹¹⁶ *Ibid.*

in trying to give meaning to crimes by using IHRL treaties, courts disregard the accused's right to a fair trial. One of the cornerstones to a fair criminal justice system is the right to a fair trial. The accused's right to a fair trial is guaranteed under several IHRL treaties. Moreover, the principle of legality under IHRL treaties stipulates that an individual should not be punished for an offence that is not adequately defined under the law.¹¹⁷ IHRL instruments, including article 7(2) of the ACHPR, article 15 of the ICCPR and article 11 of the UDHR, entrench the principle of legality guaranteeing the accused's right to a fair trial in very strong terms.¹¹⁸

This principle comes into force in ICL under article 22 of the Rome Statute, which 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.”¹¹⁹

Stemming from IHRL, the principle of legality is part of the accused's right to a fair trial. The accused is protected by the principle of legality, which dictates that a crime should be clearly defined, published, accessible and foreseeable. An individual should be aware of what conduct is prohibited so that they can decide whether to engage in the said conduct.¹²⁰ Thus, where crimes are not clearly proscribed, the accused is deprived of the opportunity to know at the time they engage in such conduct whether their conduct would be regarded as a criminal offence under applicable law at the time.¹²¹

Bolstering the arguments for using IHRL treaties to define criminal acts, the act of forced marriage is prohibited by many relevant human-rights instruments. Notable provisions are article 23(3) of the ICCPR, article 16 of the UDHR and the most comprehensive rule forbidding forced marriage contained in article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, which provides:

“no marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnise the marriage and of witnesses, as prescribed by law.”

¹¹⁷ Art 22 of the Rome Statute.

¹¹⁸ UDHR art 11(2); Banjul Charter art 7(2); ICCPR art 15.

¹¹⁹ Art 22(2) of the Rome Statute.

¹²⁰ In slight contrast, see *CR v United Kingdom* Judgment Case No 48/1994/495/577 European Courts of Human Rights (EurCtHR) (27 October 1995), where the EurCtHR convicted the accused of marital rape, which the United Kingdom had abolished. The accused raised the defence that the criminal penalty for marital rape had been nullified and, therefore, subjecting the accused to an arbitrary prosecution and punishment violated the principle of legality. The accused had not foreseen that marital rape was a crime. The EurCtHR found the accused guilty by stating that he foresaw the reversal of the abolished law. The court did not apply new criminal statutes (*CR v United Kingdom* Judgment *supra* par 22–23, 34, 38, 41–43).

¹²¹ *Ibid.*

IHRL may prohibit forced marriage, but IHRL does not establish individual criminal responsibility for forced marriage. It is also possible that international courts or tribunals use IHRL treaties to define forced marriage as other inhumane acts or sexual slavery because IHRL treaties also define what a legal marriage is.

However, the fact that forced marriage is a violation of human rights does not necessarily mean that the principle of legality is satisfied. The principle of legality requires courts/tribunals to interpret criminal legislation in such a manner that the conduct of forced marriage remains on the fringes of the definition of existing crime. Also, criminal conduct should be in writing, clear, defined, foreseeable and accessible. Moreover, the conduct prosecuted needs to align with the *actus reus* and *mens rea* elements of a crime. For judges at the ECCC, ICC and the SCSL to review IHRL treaties to justify categorising forced marriage as inhumane acts or sexual slavery, one concludes that these international courts and tribunals are contravening the principle of legality as enumerated in article 22(2) of the Rome Statute, thereby undermining the accused's right to a fair trial.

8 CONCLUSION

While various IHRL instruments, including CEDAW, the UDHR and the ICCPR prohibit forced marriage, due to its coercive nature and the requirement for full and free consent, they do not explicitly define forced marriage as a crime. Additionally, IHRL does not attach individual criminal responsibility for the crime of forced marriage. IHRL merely indicates that forced marriage is forbidden. Thus, prosecuting an accused person for the offence of forced marriage under ICL violates the principle of legality since forced marriage is uncodified in all ICL statutes. Therefore, courts and tribunals should not be seen using IHRL to fill in careless gaps left by ICL statutes in prosecuting accused persons for forced marriages since IHRL treaties are not criminalising statutes. Rather, the crime of forced marriage should be codified so as to guarantee the rights of the accused under IHRL and ICL, which stipulates that accused persons should not be prosecuted for criminal acts that were not considered crimes at the time they engaged in such acts.