



# Forced Marriage as the Crime Against Humanity of ‘Other Inhumane Acts’ in the International Criminal Court’s *Ongwen* Case

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## Abstract

The *Ongwen* case, concluded in December 2022 at the International Criminal Court (ICC), convicted the defendant of a gender-based act that had never been litigated by the ICC: forced marriage. This article argues that the judicial consideration of forced marriage in *Ongwen* has settled the international jurisprudence in three important ways. First, it clarified the classification of forced marriage as an ‘other inhumane act’. Second, it recognised and solidified the conduct and harms captured by the term ‘forced marriage’, distinguishing it from other crimes against humanity. Finally, it confirmed that prosecution of forced marriage does not contravene *nullum crimen sine lege* principles. These outcomes will play a key role in future recognition and prosecutions of forced marriage in international criminal law. This article suggests that

the logical next step is to explicitly list forced marriage as a crime against humanity in the Rome Statute and the draft Crimes Against Humanity Convention.

## Keywords

armed conflict – forced marriage – International Criminal Court – sexual and gender-based violence

## 1 Introduction

The case of *Prosecutor v Ongwen*, concluded in December 2022 at the International Criminal Court (ICC),<sup>1</sup> is replete with ground-breaking developments. These include charging and convicting a defendant for a gender-based act that had never been litigated by the ICC: forced marriage.<sup>2</sup> While this case represented the first such prosecution in the ICC, forced marriage had been previously prosecuted by the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). This article argues that the ICC Trial and Appeal Chambers' discussion of forced marriage in *Ongwen* has settled the international jurisprudence in three important ways. First, it clarified the classification of forced marriage as an 'other inhumane act'. Second, it recognised and solidified the conduct and harms captured by the term 'forced marriage', distinguishing it from other crimes against humanity. Finally, it confirmed that prosecution of forced marriage does not contravene *nullum crimen sine lege* ('no crime without law') principles. These outcomes

1 ICC, *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-422-Red [93], Pre-Trial Chamber, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016 (hereafter *Ongwen* Confirmation of Charges); ICC, *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber IX, Judgment, 4 February 2021 (hereafter *Ongwen* Trial Judgment); ICC, *Prosecutor v. Dominic Ongwen*, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment", Case No. ICC-02/04-01/15 A, Appeals Chamber, Judgment, 15 December 2022 (hereafter *Ongwen* Appeals Judgment).

2 Women's Initiatives for Gender Justice, *Trailblazing ICC Judgment on SGBC—Ongwen verdict advances international accountability for forced marriage and forced pregnancy* (4 February 2021), available online at [4genderjustice.org/trailblazing-icc-judgment-on-sgbc-ongwen-verdict/](https://4genderjustice.org/trailblazing-icc-judgment-on-sgbc-ongwen-verdict/) (accessed 22 May 2023). Other 'firsts' include prosecuting and convicting forced pregnancy, distinguishing between enslavement and sexual slavery of girls, and prosecuting a former child soldier for international crimes, some of which he, too, had suffered from the age of nine years to adulthood.

from *Ongwen* will play a key role in future recognition and prosecutions of forced marriage in international criminal law.

This article begins by introducing forced marriage as committed by the Lord's Resistance Army (LRA) in Uganda and describes the conviction of LRA commander Dominic Ongwen for forced marriage. It then turns to international courts' and tribunals' use of the crimes against humanity category of 'other inhumane acts' to assess why this category is relevant and necessary, and examines how these courts have used 'other inhumane acts' to prosecute forced marriage. The article then explores the conduct and harms encapsulated by the phrase 'forced marriage' and examines how the ICC Appeals Chamber dealt with Ongwen's argument that the Prosecutor's approach to forced marriage violated one of the principles of legality, *nullum crimen sine lege*.<sup>3</sup> This article concludes that, despite the clarity brought by the ICC's findings regarding forced marriage in armed conflict in the *Ongwen* case, it would be wise to explicitly enumerate forced marriage as a crime against humanity both in the Rome Statute and in the draft Crimes Against Humanity Convention, to avoid continual relitigation of the classification, definition, and status of this act.

## 2 Forced Marriages Imposed by the LRA and Ongwen's Related Conviction

Throughout the most recent Ugandan civil war (1986–2006), members of the LRA, led by Joseph Kony, forced girls and young women to serve as 'wives' of its fighters. The *Ongwen* case detailed many facts regarding LRA forced marriages.<sup>4</sup> Dominic Ongwen was a high-ranking soldier in the LRA's Sinia brigade.<sup>5</sup> Girls and women were abducted by members of the brigade, forcibly assigned as 'wives', required to undertake various forms of domestic labour, childbearing, and childcare duties, beaten regularly until their bodies were swollen and/or they were unconscious, and routinely raped by their 'husbands'.<sup>6</sup>

3 This article focuses on these issues because they were repeatedly raised by Ongwen and his counsel throughout the case. Other defence arguments regarding forced marriage, such as those relating to modes of liability, are outside the scope of this article.

4 *Ongwen* Trial Judgment, *supra* note 1, paras 205–437, 2009–2309.

5 *Ibid.*, paras 134–138. The Sinia Brigade was active in Uganda, Sudan, Central African Republic, and Democratic Republic of Congo. The ICC's jurisdiction over LRA actions relates only to Uganda, although the judges did draw on testimony relating to crimes committed in other states as background: *ibid.*, paras 310, 314, 579, 609–610, 624, 876, 925, 941, 984, 1009.

6 *Ibid.*, paras 2256–2270, 2289–2308.

Strict control was imposed on every aspect of the girls' and women's lives in the forced marriages through brutal disciplinary measures. The 'wives' were subject to violent discipline for 'disobedience, resistance, not conceiving [a child], talking together unsupervised, having blank expressions on their faces, looking miserable, allegedly planning an escape, or breaking rules or taboos of the fighting group'.<sup>7</sup> 'Husbands' could have more than one 'wife', but punishment was meted out to any 'wife' suspected of or engaging in infidelity, confirming each 'wife' as belonging exclusively to her allocated 'husband'.<sup>8</sup>

The ICC Trial Chamber found a 'coordinated and methodical effort' by Dominic Ongwen, the brigade leadership, and the LRA's leader Joseph Kony, relying on the LRA soldiers under their control, to engage in forced marriage.<sup>9</sup> Dominic Ongwen was therefore convicted as a direct perpetrator for forcing girls and women to be his 'wives' and as an indirect perpetrator for enforcing and sustaining this system of forced marriage within the Sinia brigade.<sup>10</sup>

### 3 The Crime Against Humanity of 'Other Inhumane Acts'

The ICC's Prosecutor charged Ongwen with directly and indirectly committing forced marriage as the crime against humanity of 'other inhumane acts', charges which were confirmed by the Pre-Trial Chamber.<sup>11</sup> The Prosecutor classified forced marriage in this manner for two reasons: first, the category of 'other inhumane acts' has historically been used to incorporate unenumerated acts deemed by the prosecution to be serious; and second, this category has been utilised by previous tribunals to classify forced marriage.<sup>12</sup> Given that this categorisation was the subject of numerous defence arguments in *Ongwen*, it is necessary to review the residual crime of 'other inhumane acts' to understand

7 H. Baumeister, *Sexualised Crimes, Armed Conflict and the Law* (Routledge, Abingdon, 2018), p. 51.

8 *Ibid.*

9 *Ongwen* Trial Judgment, *supra* note 1, paras 212, 3089; see also *Ongwen* Confirmation of Charges, *supra* note 1, para. 137.

10 *Ongwen* Trial Judgment, *supra* note 1, paras 2098–2142, 3097, 3100.

11 *Ongwen* Confirmation of Charges, *supra* note 1, paras 87, 117, 124. In particular, the relevant counts were Count 50 (direct participation) and Count 61 (indirect co-perpetration and ordering).

12 ICC, *Prosecutor v. Domenic Ongwen*, Case No. ICC-02/04-01/15, Appeals Chamber, Public Redacted Version of 'Prosecution Response to "Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021"', 19 November 2021, paras 561–565 (hereafter *Ongwen* Prosecution Appeals Brief).

why this is presently the appropriate provision under which to prosecute forced marriage.

International and national tribunals have identified numerous types of conduct as falling within the crimes against humanity residual category of 'other inhumane acts' since World War II. 'Other inhumane acts' were first instituted in 1945 as a crime against humanity through the international legal instruments governing the International Military Tribunals at Nuremberg and Tokyo,<sup>13</sup> and this category was repeated in the laws governing post-World War II prosecutions of European Axis war criminals.<sup>14</sup>

In 1950, the United Nations International Law Commission (ILC) adopted the Nuremberg Principles, further codifying and establishing 'other inhuman acts done against any civilian population' as a crime against humanity.<sup>15</sup> In 1993 and 1994, the United Nations Security Council incorporated 'other inhumane acts' as a crime against humanity into the Statutes for the International Criminal Tribunals for the former Yugoslavia (the ICTY)<sup>16</sup> and for Rwanda (the ICTR).<sup>17</sup>

By 1996, the International Law Commission adopted the Draft Code of Crimes Against the Peace and Security of Mankind, which prohibited '[o]ther inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm,' acknowledging the impossibility of creating 'an exhaustive list of the inhumane acts which

13 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 in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (London Agreement) (82 U.N.T.S. 280), 8 August 1945, Article 6(c); Supreme Commander for the Allied Powers in Occupied Japan, *Charter of the International Military Tribunal for the Far East*, 19 January 1946 (TIAS No. 1589, 4 Bevens 20) (as amended April 26, 1946, 4 Bevens 27), Article 5(c).

14 *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945*, (3 Official Gazette Control Council for Germany 1946), pp. 50–55, Article 11.1(c): 'Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts'.

15 UN General Assembly, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, (A/RES/95), 11 December 1946, Principle VI.3.

16 Statute of the International Criminal Tribunal for the Former Yugoslavia (UN Doc. S/RES/827, amended by S/RES/1877), Article 5(i).

17 Statute of the International Criminal Tribunal for Rwanda (UN Doc. S/RES/955, amended by S/RES/1901), Article 3(i).

might constitute crimes against humanity'.<sup>18</sup> Two years later, the Rome Statute codified 'other inhumane acts' as a distinct crime against humanity to be investigated and prosecuted at the ICC.<sup>19</sup> In 2000, the Statute for the SCSL did the same,<sup>20</sup> and shortly thereafter, the Law on the Establishment of the ECCC also followed suit.<sup>21</sup> The SCSL's Appeals Chamber observed that, given this history, the materially distinct category of 'other inhumane acts' had crystallised into customary international law.<sup>22</sup> The existence and legitimacy of 'other inhumane acts' as a category is therefore well-settled in international criminal law.

The jurisprudence of these tribunals developed the parameters of 'other inhumane acts', with the ICTY in particular analysing this residual clause. In the *Čelebići* case, the ICTY drew on 'inhumane treatment' from the Geneva Conventions and human rights law, determining this to be consistent with the crime against humanity of 'other inhumane acts'.<sup>23</sup> The Tribunal held that the prohibition on 'inhumane treatment' is prohibited under 'conventional and customary law'.<sup>24</sup> The ICTY assessed 'other inhumane acts' in several cases, and ultimately identified the basic characteristics of 'other inhumane acts' in its *Karadžić* Trial Judgment:

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- 18 International Law Commission (ILC), 'Draft Code of Offences against the Peace and Security of Mankind with Commentaries', *Yearbook of the International Law Commission*, 1996, Vol. II, Part Two, p. 50, Commentary (17) on Article 18(k).
- 19 ICC, *Rome Statute of the International Criminal Court* (UN Doc A/CONF.183/9), Article 7(1)(k) (hereafter Rome Statute).
- 20 Statute of the Special Court for Sierra Leone, annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002), Article 2(i).
- 21 Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 5.
- 22 SCSL, *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008 (hereafter *AFRC Brima Appeals Judgment*), paras 198, 200, citing ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 315 (hereafter *Stakić Appeals Judgment*); ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, Trial Chamber, 17 January 2005, para. 624 (hereafter *Blagojević and Jokić Trial Judgment*).
- 23 ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, paras 516–542 (*Čelebići*). The ICTY also referred to international humanitarian law, international human rights law and international criminal law (including the ICC Rome Statute) in *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, paras 562–566.
- 24 *Čelebići*, supra note 23, para. 517. Despite the extensive use of different sources of international law, the approach to 'other inhumane acts' has not been without criticism; see G. MacNeil, *Legality Matters: Crimes Against Humanity and the Problems and Promise of the Prohibition on Other Inhumane Acts* (T.M.C. Asser Press, The Hague, 2021), particularly p. 131 *et seq.*

(i) there was an act or omission of similar seriousness to the other enumerated acts under Article 5; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (iii) the act or omission was committed with the intent to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim(s), or with the knowledge that this act or omission was likely to cause such suffering or a serious attack upon human dignity.<sup>25</sup>

In similar wording, but without the intent requirement, the ICC Elements of Crimes mandate that ‘other inhumane acts’ must fulfil two material elements:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in Article 7, paragraph 1, of the Statute.<sup>26</sup>

In the *Katanga* Confirmation of Charges decision, the ICC Pre-Trial Chamber held that ‘inhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in Article 7(1) of the Statute.’<sup>27</sup> Thus, the ICC’s perspective on such ‘inhumane acts’ is that it is appropriate for courts to conclude that ‘other inhumane acts’ constitute crimes against humanity fulfilling Article 22’s *nullum crimen sine lege* criteria.<sup>28</sup>

The residual criminal category of ‘other inhumane acts’ has been used by international courts to delineate numerous acts, including sexual and gender-based violations. For example, the ICTR recognised forced public nudity

25 ICTY, *Prosecutor v Radovan Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 494.

26 The second requirement was added to appease state concerns about any imprecision in this category of crime: D. Robinson, ‘Defining “Crimes against Humanity” at the Rome Conference’, 93(1) *American Journal of International Law* (1999) 43–57, at p. 56. For more detail on this crime, see R. Dubler and M. Kalyk, *Crimes Against Humanity in the 21st Century: Law, Practice and Threats to International Peace and Security* (Brill, Leiden, 2018) 942–958.

27 ICC, *Prosecutor v Germain Katanga*, Case No. ICC-01/04-01/07-717, Pre-Trial Chamber, Decision on the Confirmation of Charges, 30 September 2008, paras 441, 448.

28 J.-P. Pérez-León Acevedo, ‘The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses’, 17 *Anuario Mexicano de Derecho Internacional* (2017) 145–186 at p. 163.

and sexual and physical mutilation of corpses as ‘other inhumane acts.’<sup>29</sup> The ICTY, ICTR, and SCSL held that serious physical and mental injuries,<sup>30</sup> beatings and cruel treatment,<sup>31</sup> forcible transfer,<sup>32</sup> forced prostitution,<sup>33</sup> ‘forced disappearance, beatings, torture, sexual violence, humiliation, harassment, psychological abuse, and confinement in inhumane conditions’, and ‘mutilation and other types of severe bodily harm, beatings and other acts of violence’<sup>34</sup> also amount to ‘other inhumane acts’.

To allow some heinous crimes to go unpunished simply because they are not explicitly enumerated, when they clearly comprise harmful conduct as grave as other crimes against humanity, creates a legal absurdity—an absurdity the residual category of ‘other inhumane acts’, like the residual war crime category of ‘outrages against personal dignity’, seeks to counter. As the ICTY stated:

The phrase ‘other inhumane acts’ was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.<sup>35</sup>

Likewise, the ICC Trial Chamber acknowledged the necessity of the residual clause, noting the ‘impossibility of exhaustively enumerating every inhumane act which could constitute a crime.’<sup>36</sup>

29 ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 697; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, Judgment, 21 May 1999, para. 730; ICTR, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Trial Chamber, Judgment, 16 May 2003, paras 303–313, 465–467; ICTR, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Chamber, Judgment and Sentence, 1 December 2003, para. 936.

30 ICTR, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Appeals Chamber, Judgment, 9 July 2004, para. 271; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Trial Chamber, Judgment, 29 November 2002, paras 239–240; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 239; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1, Trial Chamber, Opinion and Judgment, 7 May 1997, paras 730, 737, 744.

31 AFRC *Brima* Appeals Judgment, *supra* note 22, paras 184–185.

32 *Stakić* Appeals Judgment, *supra* note 22, para. 317; *Blagojević and Jokić* Trial Judgment, *supra* note 22, para. 629; ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Chamber, Judgment, 2 August 2001, para. 523.

33 ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74, Trial Chamber, Judgment, 29 May 2013, para. 79; ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, para. 566.

34 ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 435.

35 *Kupreškić et al.*, *supra* note 33, para. 563. See also *Prosecutor v. Blaskić*, IT-95-14-T, Trial Chamber Judgment, 3 March 2000, para 237.

36 *Ongwen* Trial Judgment, *supra* note 1, para. 2745.

The crime against humanity of ‘other inhumane acts’ has existed in international law for many decades, and has been defined in myriad sources. It is rooted in the core concepts of humanity and human dignity.<sup>37</sup> This is why it is appropriate to prosecute forced marriage, which deprives its direct and indirect victims of basic human dignity, under ‘other inhumane acts’; the next sections will explore how international courts have done so.

#### 4 Forced Marriage as an ‘Other Inhumane Act’

Prior to the ICC’s *Ongwen* case, the SCSL and the ECCC both held that forced marriage constitutes an inhumane act distinct from other crimes against humanity and therefore squarely falls within the ‘other inhumane acts’ category.<sup>38</sup> These determinations were crucial to, and helped to shape, the ICC’s subsequent consideration of forced marriage.

##### 4.1 *The SCSL and ECCC’s Determinations on Forced Marriage*

Examining the widespread phenomenon of forced marriage in the brutal armed conflict in Sierra Leone in the 1990s, the SCSL Appeals Chamber specifically determined in 2008 in *Prosecutor v. Brima, Kamara and Kanu* (*Brima et al.*) that forced marriage met ‘other inhumane acts’ requirements.<sup>39</sup> In particular, the act causes ‘great suffering, or serious injury to body or to mental or physical health’,<sup>40</sup> and was ‘of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence’.<sup>41</sup> The Appeals Chamber emphasised the gravity of long-lasting and stigmatising harms to forced marriage victims, especially given their young ages, stating that many ‘were children themselves’.<sup>42</sup> It

37 B. Kuschnik, ‘Humaneness, Humankind and Crimes against Humanity’, 2(2) *Goettingen Journal of International Law* (2010) 501–530.

38 *AFRC Brima* Appeals Judgment, *supra* note 22, para. 198; SCSL, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, paras 1464, 1473 (hereafter *RUF Sesay Trial Judgment*); SCSL, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, paras 726, 849, 861–862 (hereafter *RUF Sesay Appeals Judgment*); ECCC, *Co-Prosecutors v. Nuon Chea and Khieu Samphân*, Case No. 002/19-09-2007/ECCC/TC, Trial Chamber, Judgment, 16 November 2018, paras 741, 4172, 4198, 4303–4305 (hereafter *Case 002/02 Trial Judgment*).

39 *AFRC Brima* Appeals Judgment, *supra* note 22, para 198.

40 *Ibid.*, para. 200.

41 *Ibid.*

42 *Ibid.*, para. 199.

also concluded that forced marriage was not subsumed by the crime against humanity of sexual slavery.<sup>43</sup>

One year later, the SCSL's Appeals Chamber upheld the first-ever conviction for forced marriage as an 'other inhumane act' crime against humanity in *Prosecutor v Sesay, Kallon and Gbao (Sesay et al.)*,<sup>44</sup> agreeing with the Appeals Chamber in *Brima et al.* on this legal characterisation of forced marriage.<sup>45</sup> Additionally, the Appeals Chamber confirmed that the only elements of forced marriage the Prosecutor must prove are the *mens rea* and *actus reus* of 'other inhumane acts'.<sup>46</sup>

In 2018, the ECCC Trial Chamber charged and convicted top-ranking former Khmer Rouge leaders, Nuon Chea and Khieu Samphân, for forced marriage as 'other inhumane acts',<sup>47</sup> finding that this category of crime was prohibited under customary international law at the relevant time, and that the 'other inhumane acts' category is not restricted to a specifically-elaborated list of conduct.<sup>48</sup> Moreover, the ECCC found that forced marriage need not have been explicitly recognised as part of the category by 1975.<sup>49</sup> The Trial Chamber clarified that since 'other inhumane acts' is *in itself* a distinct crime against humanity, it is not necessary to prove that each constituent act was recognised as a separate crime because *nullum crimen sine lege* requirements attach only to the entire category 'other inhumane acts,' not to the different subcategories

43 *Ibid.*, paras 190, 195. It declined to enter a conviction because 'it is convinced that society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population, is adequately reflected by recognising that such conduct is criminal and that it constitutes an "Other Inhumane Act" capable of incurring individual criminal responsibility in international law', at *ibid.*, paras 202, 713. For an analysis of this reasoning, see V. Oosterveld, 'Forced Marriage: Terminological Coherence and Dissonance in International Criminal Law', 27(4) *William & Mary Bill of Rights Journal* (2019) 1263–1282 at 1266–1267 (hereafter Oosterveld, "Terminological Coherence").

44 *RUF Sesay Appeals Judgment*, *supra* note 38, paras 726, 849; *RUF Sesay Trial Judgment*, *supra* note 38, paras 168, 1464, 1473.

45 *RUF Sesay Appeals Judgment*, *supra* note 38, para. 2307.

46 *Ibid.*, paras 740 (Sesay), 861 (Kallon) and 972 (Gbao), confirming *RUF Sesay Trial Judgment*, *supra* note 38, para. 168. Note that, in a subsequent case in which forced marriage was not charged, *Prosecutor v. Taylor*, the Trial Chamber opined in *obiter dicta* that forced marriage should not be pursued under 'other inhumane acts' but rather as 'conjugal slavery': *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, paras 422, 424, 427–428, 1101, 1700 (hereafter *Taylor Trial Judgment*). This is discussed in Section 5 below.

47 *Case 002/02 Trial Judgment*, *supra* note 38, paras 4172, 4198, 4303–4305.

48 *Ibid.*, para. 741.

49 *Ibid.*

thereof.<sup>50</sup> The ECCC found that forced marriage satisfied both requirements for ‘other inhumane acts’ as it ‘caused serious mental or physical suffering or injury’ or ‘constituted a serious attack on human dignity’ and it was of a similar gravity to the enumerated crimes against humanity.<sup>51</sup>

The ECCC Trial Chamber further distinguished forced marriage from other crimes against humanity due to its unique violation of the international human right to consensually marry.<sup>52</sup> Like the SCSL did in its analysis of marriage in Sierra Leonean society,<sup>53</sup> the ECCC differentiated traditional or arranged marriages in Cambodian society from the non-consensual marriages being prosecuted.<sup>54</sup> The Trial Chamber found that genuine consent was impossible in Khmer Rouge-enforced marriages given the regime’s coercive environment, in which victims were threatened with death or other punishments for non-compliance.<sup>55</sup> Victims of forced marriage under the Khmer regime were thereby denied agency to enter into marriage with the free and full consent of both partners.

On 22 September 2022, the Supreme Court Chamber rejected defendant Khieu Samphân’s appeal challenging his conviction on forced marriage under ‘other inhumane acts’.<sup>56</sup> In dismissing the defendant’s contention that it was not foreseeable and accessible to him that forced marriage specifically constituted a crime against humanity, the Supreme Court Chamber clarified that the requirements of foreseeability and accessibility within the principle of legality are only applicable to the general category of ‘other inhumane acts’.<sup>57</sup> The Appeals Judgment also dismissed the defendant’s argument that his conduct must be specifically prohibited in human rights instruments for it to be judged an inhumane act. The Supreme Court Chambers instead found

50 ECCC, *Co-Prosecutors v. Ieng Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), Pre-Trial Chamber, Decision on Ieng Sary Appeal on Closing Order, 11 April 2011, para. 378 (emphasis in original).

51 *Case 002/02* Trial Judgment, *supra* note 38, para. 746.

52 *Ibid.*, para. 743.

53 See e.g., *AFRC Brima* Appeals Judgment, *supra* note 22, para. 127; SCSL, *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Trial Chamber, Judgment, 20 June 2007, para. 11 (Sebutinde J., concurring) (hereafter *AFRC Brima* Trial Judgment).

54 *Case 002/02* Trial Judgment, *supra* note 38, para. 3688.

55 *Ibid.*, paras 3620–3625, 3648–3666, 3694, 3688 (sexual intercourse consummating the ‘marriage’ was compulsory and monitored, with refusal leading to rape by militia or ‘husbands’).

56 ECCC, *Co-Prosecutors v. Khieu Samphân*, Case No. 002/19-09-2007-ECCC/SC, Supreme Court Chamber, Appeal Judgment, 23 December 2022, paras 1171–1195 (hereafter *Case 002/02* Appeals Judgment).

57 *Ibid.*, para. 93.

that ‘other inhumane acts’ comprised ‘conduct infringing basic human rights appertaining to human beings, as identified under international legal instruments’.<sup>58</sup> Moreover, the particular conduct need not be expressly criminalised by international law to qualify as an ‘other inhumane act’; requiring otherwise would defeat the necessity of this residual crime against humanity category.<sup>59</sup>

#### 4.2 *The ICC Confirms Forced Marriage as a Distinct Crime Against Humanity*

In *Ongwen*, the Prosecutor charged forced marriage as an ‘other inhumane act’, while the defence claimed that this categorization was invalid because the acts described are subsumed by the charges for sexual slavery.<sup>60</sup> The Chamber indicated that, in order to qualify as an ‘other inhumane act’ under Article 7(1) (k) of the Rome Statute, the alleged acts of forced marriage—forcing women and girls to serve as ‘conjugal partners’ to Ongwen and other LRA fighters in the Sinia brigade—must satisfy statutory requirements.<sup>61</sup> As outlined in Section 3 above, these must be acts which intentionally caused great suffering or serious injury to body or to mental or physical health, and must be of a character similar to any other acts listed in the Article 7(1) crimes against humanity provision.<sup>62</sup> Additionally, given the defence argument, forced marriage must be distinguishable from sexual slavery (and, by extension, any other crime against humanity).<sup>63</sup> The Pre-Trial Chamber concluded that all of these requirements were met: ‘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 ... forced marriage may, in the abstract, qualify as “other inhumane acts” under Article 7 of the Statute rather than being subsumed by the crime of sexual slavery’.<sup>64</sup> The Pre-Trial Chamber concluded ‘forced marriage as an other inhumane act differs from the other crimes with which Dominic Ongwen is charged, and notably from the crime of sexual slavery, in terms of conduct, ensuing harm, and protected interests’ due to its core and distinct feature: a forced conjugal exclusive union.<sup>65</sup> This approach to forced marriage was confirmed by the

<sup>58</sup> *Ibid.*, para. 1131.

<sup>59</sup> *Ibid.*, para. 1130.

<sup>60</sup> *Ongwen* Confirmation of Charges, *supra* note 1, para. 87.

<sup>61</sup> *Ibid.*, para. 88.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, para. 91.

<sup>65</sup> *Ibid.*, paras 92–93.

Trial and Appeals Chambers' holdings that forced marriage is similar in nature and gravity to the other acts listed in Article 7(1) of the Rome Statute, but also comprises a course of conduct which differs from those acts.<sup>66</sup>

Given the similar and sustained reasoning stemming from the SCSL's *Brima et al.* appeals judgment and the *Sesay et al.* trial and appeals judgments, as well as decisions of the ECCC and ICC, it is now clear that forced marriage qualifies as an 'other inhumane act' within the crimes against humanity category under international criminal law. The clarity provided by the *Ongwen* case helps to answer the questions raised by the SCSL's *Brima et al.* and *Taylor* trial judgments about categorizing forced marriage in this manner.

## 5 Clarification of the Conduct Constituting Forced Marriage and Associated Harms

While there was strong agreement among the SCSL, ECCC, and ICC that forced marriage amounts to an 'other inhumane act', there was initially less clarity on the exact conduct and precise harms encompassed by the term. This lack of clarity stemmed from the evolving case law of the SCSL and ECCC. The SCSL's first trial judgment to consider the conduct and harms of forced marriage—*Brima et al.*—dismissed the forced marriage charges as being subsumed by the sexual slavery charges.<sup>67</sup> This flattening of forced marriage into solely a sexual crime was reversed on appeal.<sup>68</sup> The Appeals Chamber defined forced marriage as a 'forced conjugal association' which encompassed two types of harm to victims: injuries, including stigmatisation, stemming from forcibly having the status of 'wife' imposed upon them; and maltreatment stemming from being compelled to carry out 'conjugal duties' including forced domestic labour, submitting to rape, and bearing and rearing children of the 'marriage'.<sup>69</sup> This approach to the conduct of forced marriage was subsequently reinforced

66 *Ongwen* Trial Judgment, *supra* note 1, paras 2747–2748; *Ongwen* Appeal Judgment, *supra* note 1, para. 1022.

67 *AFRC Brima* Trial Judgment, *supra* note 53, para 712.

68 *AFRC Brima* Appeals Judgment, para. 195. For a critique of this flattening, see V. Oosterveld, 'The Special Court for Sierra Leone's Consideration of Gender-based Violence: Contributing to Transitional Justice?', 10(1) *Human Rights Review* (2009) 73–98 at p. 86.

69 *AFRC Brima* Appeals Judgment, *supra* note 22, paras 190–193 and 199–200. See also V. Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties', 2(2) *Journal of International Humanitarian Legal Studies* (2011) 127–158 at p. 135 (hereafter Oosterveld, 'Legal Advances').

by the Trial Chamber in *Prosecutor v. Sesay, Kallon and Gbao*.<sup>70</sup> In particular, the trial judgment indicated that the imposition of the status of ‘wife’ led to the psychological manipulation of victims, instilled fear in their communities, destroyed families, and undermined Sierra Leonean society.<sup>71</sup> This growing clarity on the conduct and harms of forced marriage was undermined by the SCSL’s final trial judgment in *Prosecutor v. Taylor*, which opined in *obiter dicta* that the term ‘conjugal slavery’ was more appropriate than ‘forced marriage’ and that the illegal conduct is a combination of sexual and domestic enslavement.<sup>72</sup> The Appeals Chamber did not discuss this view, thus missing the opportunity to clarify or reconcile the jurisprudence in this regard.

The ECCC, as the second tribunal to prosecute forced marriage, agreed that the illegal conduct involved forcing victims to enter into conjugal relationships in coercive circumstances.<sup>73</sup> The ECCC identified two types of harm: the damage done to male and female victims who had the status of ‘spouse’ forcibly imposed upon them through Khmer Rouge-organised marriage ceremonies lacking traditional rituals or customs, and the resulting rape.<sup>74</sup> The ECCC’s approach demonstrated that the specific conduct captured by the term ‘forced marriage’ is not uniform.<sup>75</sup> The SCSL relied heavily on forced domestic and sexual labour, and the use of the term ‘wife’ without legal marriage, as integral parts of the illegal conduct.<sup>76</sup> On the other hand, the ECCC emphasised lack of consent to actual marriage under Khmer Rouge law and the rape after marriage.<sup>77</sup> These differences indicate both the flexibility of the term ‘forced marriage’, and potentially that the exact conduct comprising the term was undertheorised.<sup>78</sup>

The *Ongwen* trial and appeals judgments deepened and solidified the understanding of the conduct and harms captured by the term ‘forced marriage’. The Pre-Trial, Trial, and Appeals Chambers indicated that conduct charged as

70 RUF Sesay Trial Judgment, *supra* note 38 at paras 1154–1155, 1211–1213, 1293, 1295–1296, 1348–1349, 1412–1413, 1466–1472.

71 *Ibid.*, paras 1348–1349, 1466.

72 *Taylor*, *supra* note 46, paras 425, 427–430.

73 ECCC, *Co-Prosecutors v. Nuon Chea and Khieu Samphân*, Case No. 002/19-09-2007/ECCC/OCIJ, Closing Order, 15 September 2010, para. 1443.

74 *Case 002/02* Trial Judgment, *supra* note 38, paras 3670–3701.

75 See Oosterveld, ‘Terminological Coherence’, *supra* note 43, p. 1277.

76 See, for example, *AFRC Brima Appeals Judgment*, *supra* note 22, paras 190, 199.

77 *Case 002/02* Trial Judgment, *supra* note 38, paras 3670–3701.

78 Oosterveld, ‘Terminological Coherence’, *supra* note 43, p. 1277. See also M. O’Brien, ‘“Don’t Kill them, Let’s Choose them as Wives”: the Development of the Crimes of Forced Marriage, Sexual Slavery and Enforced Prostitution in International Criminal Law’, 20(3) *International Journal of Human Rights* (2016) 386–406 at pp. 391–392.

forced marriage involves at least two types of unique harm: the violation by the accused of the victim's relational autonomy (including social ostracisation), and a constellation of human rights violations.<sup>79</sup> Arguably, this approach more precisely elucidates the 'central element' of forced marriage: 'the imposition, regardless of the will of the victim, of duties that are associated with marriage, as well as of a social status' of being the perpetrator's 'spouse'.<sup>80</sup> This imposition of a 'spousal' status creates 'exclusivity', under which the victim cannot have any other conjugal relationships. The Pre-Trial Chamber noted that the forced conjugal association plus the exclusivity are 'characteristic aspect[s] of forced marriage' which are 'absent from any other crime with which Dominic Ongwen is charged'.<sup>81</sup> The Pre-Trial Chamber articulated the value protected by the charge—'the independently recognised basic right to consensually marry and establish a family'—which is 'distinct from e.g. physical or sexual integrity, or personal liberty'.<sup>82</sup> This right is recognised under international human rights treaties.<sup>83</sup> The Trial Chamber agreed that marriage, or a situation akin to marriage, 'creates a status based on a consensual and contractual relationship—it is an institution and also an act or rite' that is undermined when it is forced.<sup>84</sup> This was reinforced by the Appeals Chamber.<sup>85</sup>

The denial of relational autonomy involves the assignment of 'spousal' status to the victim.<sup>86</sup> Ongwen's defence counsel argued that 'there was no conjugal union between the perpetrators and the victims, since one of the requirements of marriage in the Acholi culture was not fulfilled and that their

79 *Ongwen* Confirmation of Charges, *supra* note 1, paras 92–94; *Ongwen* Trial Judgment, *supra* note 1, paras 2748–2751; *Ongwen* Appeals Judgment, *supra* note 1, paras 1022–1024.

80 *Ongwen* Confirmation of Charges, *supra* note 1, para. 93. This was also accepted by the trial and appellate levels: *Ongwen* Trial Judgment, *supra* note 1, paras 2748–2749; *Ongwen* Appeals Judgment, *supra* note 1, paras 1022–1024. See also *AFRC Brima* Appeals Judgment, *supra* note 22, para. 195.

81 *Ongwen* Confirmation of Charges, *supra* note 1, para. 93.

82 *Ibid.*, para. 94.

83 The ICC Appeals Chamber referred to two treaties: *Ongwen* Appeals Judgment, *supra* note 1, para. 1021, referring to UN General Assembly, *International Covenant on Civil and Political Rights*, (999 UNTS 171) (1966), Article 23(3) (hereafter ICCPR) and UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, (1249 UNTS 13) (1979) Article 16(1)(b), as well as the *Universal Declaration of Human Rights*, (UN Doc. 217 A (III)) (1948), Article 16(2). See also African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, Maputo, 11 July 2003, Article 6.

84 *Ongwen* Trial Judgment, *supra* note 1, para. 2748.

85 *Ongwen* Appeals Judgment, *supra* note 1, para. 1024.

86 *Ongwen* Confirmation of Charges, *supra* note 1, para. 93. This was also accepted by the trial and appellate levels: *Ongwen* Trial Judgment, *supra* note 1, paras 2748–2749; *Ongwen* Appeals Judgment, *supra* note 1, paras 1022–1024.

relationship was[,] in substance, “mere cohabitation”.<sup>87</sup> In answer to this, all levels of the Court stressed that the fact that the ‘marriage’ was illegal or not recognised by the laws or customs of the country or society in which the events occurred is irrelevant.<sup>88</sup> The Appeals Chamber stated that the conjugal union’s existence ‘may be established on the facts of the case including the nature of the relationship between the perpetrator and the victim, as well as the subjective view of the victim, third parties and the perpetrator’.<sup>89</sup> In other words, ‘[w]hat matters is whether or not a conjugal union was factually imposed on the victims’.<sup>90</sup> As the *nullum crimen sine lege* analysis below demonstrates, it also matters that ‘[t]he perpetrator was aware of the factual circumstances that established the character of the act’.<sup>91</sup>

The Pre-Trial, Trial, and Appeals Chambers commented on the consequences of being deprived of relational autonomy: victims suffer social stigma, mental trauma, and a serious attack on their dignity.<sup>92</sup> Stigmatisation may result in victims being rejected from their communities.<sup>93</sup> They may also suffer trauma because they bore children as a result of their forced marriage, and their children may also be affected. As the Trial Chamber observed, ‘[t]o the extent forced marriage results in the birth of children, this creates even more complex emotional and psychological effects on the victim and their children beyond the obvious physical effects of pregnancy and childbearing’.<sup>94</sup>

The second unique type of harm caused by forced marriage is a range of human rights violations experienced by victims, which differ from context to context. Here again, the ICC added more detail, indicating that these harms are connected with various ‘duties that are associated with marriage’ and ‘socially constructed gendered expectations and roles attached to [being a

87 *Ongwen* Appeals Judgment, *supra* note 1, para. 1025.

88 *Ongwen* Confirmation of Charges, *supra* note 1, para 93; *Ongwen* Trial Judgment, *supra* note 1, para. 2748; *Ongwen* Appeals Judgment, *supra* note 1, para. 1025. See also ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18-461-Corr-Red, Pre-Trial Chamber, Rectificatif à la Décision Relative à la Confirmation des Charges Portées Contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 13 November 2019, para. 555 (hereafter *Al Hassan* Confirmation of Charges); *AFRC Brima* Appeals Judgment, *supra* note 22, para. 195.

89 *Ongwen* Appeals Judgment, *supra* note 1, para. 1025.

90 *Ibid.*

91 *Ibid.*, para 1015.

92 *Ongwen* Confirmation of Charges, *supra* note 1, para. 93; *Ongwen* Trial Judgment, *supra* note 1, paras 2748–2749.

93 *Ongwen* Trial Judgment, *supra* note 1, paras 2748–2749.

94 *Ibid.*, para. 2748.

forced] “wife” or “husband”.”<sup>95</sup> Many of these human rights violations are crimes unto themselves. For example, the SCSL referred to abduction, rape, sexual slavery, enforced exclusivity in the sexual relationship, inability to leave the conjugal union for fear of violent retribution, non-consent to being placed in a polygamous conjugal situation, forced pregnancy, forced childbearing and childrearing, physical violence, forced domestic labour such as cooking and cleaning, and forced portering.<sup>96</sup> Similarly, the *Ongwen* Pre-Trial Chamber listed as indicators of forced marriage, situations in which the victim is ‘sexually or otherwise enslaved by the perpetrator’, is restricted in freedom of movement, or is subjected to repeated sexual abuse, forced pregnancy, or forced labour such as forced performance of domestic duties.<sup>97</sup> The Trial Chamber also referred to serial rape and birth of children, physical violence, forced beating and killing of other abductees, and, for those who were Ongwen’s ‘wives’, forced ‘domestic duties, including cooking, working in the garden, doing laundry, fetching and chopping wood, carrying Dominic Ongwen’s dishes, fetching water, washing, nursing Dominic Ongwen when he was injured and taking things to him’.<sup>98</sup> The Appeals Chamber added that victims were ‘placed under heavy guard’, ‘threatened with death if they tried to escape’,<sup>99</sup> raped, and subjected to physical and psychological violence.<sup>100</sup> However, these duties, roles, and consequences do not, in themselves, amount to forced marriage, as the denial of relational autonomy is also required.<sup>101</sup>

The Trial Chamber in *Ongwen* found that it is acceptable that these forced marriage human rights violations may also ‘compris[e] acts falling under one or more of the enumerated crimes’ in the Rome Statute: indeed, it is this overlap that indicates that forced marriage is ‘nonetheless “similar” in character in terms of nature and gravity, to those enumerated crimes.’<sup>102</sup> At the same time, the forced assignment of the status of ‘spouse’ is not reflected in the other enumerated acts, creating the required differentiation from those other crimes.<sup>103</sup>

95 *Ongwen* Confirmation of Charges, *supra* note 1, para. 93; *Ongwen* Trial Judgment, *supra* note 1, para. 2748; *Ongwen* Appeals Judgment, *supra* note 1, para. 1024.

96 *AFRC Brima* Appeals Judgment, *supra* note 22, para. 190. See also *RUF Sesay* Trial Judgment, *supra* note 38, paras 460, 1154–1155, 1211–1213, 1293, 1295, 1408–1411, 1413, 1460, 1468, 1472, 1553.

97 *Ongwen* Confirmation of Charges, *supra* note 1, para. 92.

98 *Ongwen* Trial Judgment, *supra* note 1, paras 205, 208, 209–210, 215, 218, 220, 2748, 2750.

99 *Ongwen* Appeals Judgment, *supra* note 1, para. 1027.

100 *Ibid.*, paras 1027–1028.

101 *Ongwen* Confirmation of Charges, *supra* note 1, paras 92–93.

102 *Ongwen* Trial Judgment, *supra* note 1, para. 2747.

103 *Ibid.*, para. 2748.

In response to defence arguments, the Pre-Trial, Trial and Appeals Chambers commented on the ways in which forced marriage differs from sexual slavery and rape as crimes against humanity, such that the presence of one does not negate the ability to consider and convict for the other. For example, sexual slavery involves ‘the perpetrator’s restriction or control of the victim’s sexual autonomy while held in a state of enslavement’, including ‘the exercise of ownership over a person.’<sup>104</sup> In contrast, ‘the other inhumane act of forced marriage penalises the perpetrator’s imposition of “conjugal association” with the victim’, a ‘relationship of exclusivity’ and ‘disciplinary consequences for breach of this exclusive relationship.’<sup>105</sup> Therefore ‘exclusivity of ownership is not an element of forced marriage’ as a form of ‘other inhumane acts.’<sup>106</sup> Similarly, ‘the crime of rape does not penalise the imposition of the “marital status” on the victim’ of forced marriage and, even though serial rape is often a part of forced marriage, ‘victims suffer trauma and stigma beyond that caused by being a rape victim alone.’<sup>107</sup> Given these differences, the Trial Chamber concluded that the ‘conduct underlying forced marriage—as well as the impact it has on victims—are not fully captured by other crimes against humanity.’<sup>108</sup>

Not all of the human rights violations associated with forced marriage constitute international crimes. ‘This is particularly so with human rights violations such as the inability to leave the conjugal union for fear of violent retribution, and non-consent to being placed in a polygamous conjugal situation.’<sup>109</sup> Others include the violation of the right to health, loss of education, and interruption of family ties.<sup>110</sup> The ICC recorded evidence of associated human rights violations that may not amount to international

<sup>104</sup> *Ongwen* Trial Judgment, *supra* note 1, para. 2750. See also *AFRC Brima* Appeals Judgment, *supra* note 22, para. 195; *RUF Sesay* Trial Judgment, *supra* note 38, para. 2307.

<sup>105</sup> *Ongwen* Confirmation of Charges, *supra* note 1, para. 93; *Ongwen* Trial Judgment, *supra* note 1, para. 2750; *Ongwen* Appeals Judgment, *supra* note 1, para. 1026. See also, *AFRC Brima* Appeals Judgment, *supra* note 22, para. 195; *RUF Sesay* Trial Judgment, *supra* note 38, para. 2307.

<sup>106</sup> *Ongwen* Appeals Judgment, *supra* note 1, para. 1026.

<sup>107</sup> *Ongwen* Trial Judgment, *supra* note 1, para. 2750. See also *AFRC Brima* Appeals Judgment, *supra* note 22, para. 199. The SCSL Trial Chamber noted the ‘lasting social stigma’ attached to the ‘bush wives’, ‘which hampers their recovery and reintegration into society’: *RUF Sesay* Trial Judgment, *supra* note 38, para. 1296.

<sup>108</sup> *Ongwen* Trial Judgment, *supra* note 1, para. 2750.

<sup>109</sup> ICC, *Prosecutor v. Ongwen*, Case No. No. ICC-02/04-01/15 A A2, Appeals Chamber, *Amici Curiae* Brief on Forced Marriage, 22 December 2021, note 52.

<sup>110</sup> ICCPR, *supra* note 83, Article 17; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, (993 UNTS 3) (1996), Articles 10, 12, 13.

crimes.<sup>111</sup> While the Chambers' forced marriage analysis overlooked certain gross violations of fundamental and non-derogable human rights of girls—as children and as female child soldiers — despite their *jus cogens* and criminal status,<sup>112</sup> the Court's delineation of the conduct and harms of forced marriage refined and solidified international criminal law's understanding of this type of inhumane act.

## 6 Forced Marriage and the Legality Principle of *Nullum Crimen Sine Lege*

Throughout his case, Ongwen argued that the charge of forced marriage violated one of the international principles of legality, in particular *nullum crimen sine lege* (*nullum crimen*). This principle is widely viewed as reflecting a general principle of international law, if not customary international law.<sup>113</sup> The principle of *nullum crimen* has two aspects: non-retroactivity and clarity of the law.<sup>114</sup> Both are reflected in Article 22 of the Rome Statute. The first aspect is found in Article 22(1), which states that '[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'. The second aspect is reflected in the fact that crimes are specifically defined in the Rome Statute, the elements of the crimes are set out in the Element of Crimes document, and Article 22(2) requires strict construction of the Rome Statute crimes.<sup>115</sup>

Ongwen raised a *nullum crimen* argument following the Confirmation of Charges decision, arguing that a strict construction of the Rome Statute, which does not list forced marriage as a cognisable act, required the Court to dismiss

111 See, e.g., *Ongwen* Trial Judgment, *supra* note 1, paras 2030–2033; ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Sentence, 6 May 2021, para. 166; ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15 A2, Appeals Chamber, Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled 'Sentence', 15 December 2022, para. 363.

112 K.M. Maloney, 'Ending Impunity for Forced Marriage in Conflict Zones: The Need for Greater Judicial Emphasis on the Human Rights of Girls', 19(2) *Journal of International Criminal Justice* (2021) 327–358 at pp. 331–332, 342–343, 348, 357–358.

113 A. Cassese, *International Criminal Law*, 2nd edn. (Oxford University Press, Oxford, 2008), pp. 40–41; A. Grabert, *Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change* (Herbert Utz Verlag, München, 2015), p. 11.

114 R. Cryer, D. Robinson and S. Vasiliev, *An Introduction to International Criminal Law and Procedure*, 4th edn. (Cambridge University Press, Cambridge, 2019), p. 18.

115 ICC, *Elements of Crimes* (UN Doc PCNICC/2000/1/Add.2) (2000).

the charges.<sup>116</sup> The Trial Chamber found that the defence was untimely in its motion but that it would consider arguments on the legal content of forced marriage in its trial judgment.<sup>117</sup> Ongwen therefore again raised a *nullum crimen* argument at the conclusion of trial using the same reasoning.<sup>118</sup> The Trial Chamber rejected this argument, finding ‘other inhumane acts’ to be a legitimate and established category of crime, for example in the case law of the ICTY and ICTR (indicating non-retroactivity).<sup>119</sup> It evaluated the acts of forced marriage against the requirements of the elements of ‘other inhumane acts’, finding that forced marriage satisfied the requirement of ‘great suffering, or serious injury to body or to mental or physical health’ and was of a character similar to, but distinct from, the other enumerated crimes against humanity (indicating clarity of law).<sup>120</sup>

Ongwen appealed, again raising a *nullum crimen* argument that his convictions for forced marriage would amount to punishment for a crime which did not exist at the time of the events in question.<sup>121</sup> The Prosecution’s Appeals Brief argued that *nullum crimen* requirements were fulfilled since it was sufficiently foreseeable and accessible to Ongwen that his inhumane acts were of similar nature and gravity as other statutorily-listed crimes against

116 ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part IV of the Defects Series), 1 February 2019, para. 41. Earlier, he had argued that the forced marriage charges were subsumed by the sexual slavery charges: ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Pre-Trial Chamber, Third Public Redacted Version of ‘Defence Brief for the Confirmation of Charges Hearing filed on 18 January 2016 as ICC-02/04-01/15-404-Conf’, 25 May 2016, paras 128–130.

117 ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Decision on Defence Motions Alleging Defects in the Confirmation Decision, 7 March 2019, paras 31–35, 37. This was confirmed by the Appeals Chamber: ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Appeals Chamber, Judgment on the Appeal of Mr. Dominic Ongwen against Trial Chamber IX’s ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’, 17 July 2019, paras 155–158, 161.

118 ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Public Redacted Version of ‘Corrected Version of “Defence Closing Brief”, filed on 24 February 2020’, 13 March 2020, para. 471.

119 *Ongwen* Trial Judgment, *supra* note 1, para. 2744.

120 *Ibid.*, paras 2743–2751.

121 ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Appeals Chamber, Public Redacted Version of ‘Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021’ filed on 21 July 2021 as ICC-02/04-01/15-1866-Conf, 19 October 2021, paras 147–148, 978 (*Ongwen* Defence Appeal Brief).

humanity.<sup>122</sup> The Appeals Chamber responded that the relevant criminal category against which to measure *nullum crimen* was ‘other inhumane acts’ and not the subcategory of forced marriage.<sup>123</sup> The Chamber found that Article 7(1)(k) sufficiently delimited ‘the action constituting an inhumane act and the consequence required as a result of that action’, such that the crime was sufficiently clear and precise.<sup>124</sup> It then evaluated whether acts of forced marriage qualify as ‘other inhumane acts’. The Appeals Chamber stated that ‘forced marriage describes a situation in which a person is compelled to enter into a conjugal union with another person by the use of physical or psychological force, or threat of force, or by taking advantage of a coercive environment ... [which] violates a person’s right to ... freely choose one’s spouse and consensually establish a family’.<sup>125</sup> It determined that the Trial Chamber did not err in finding forced marriage to be a form of ‘other inhumane acts’.<sup>126</sup> The Appeals Chamber also reiterated that ‘[t]he perpetrator was aware of the factual circumstances that established the character of the act’,<sup>127</sup> thereby fulfilling the applicable *nullum crimen* criteria.

Ongwen’s awareness of the factual circumstances establishing the inhumane character of his forced marriage acts was inescapable, since they encompassed crimes against humanity firmly established by longstanding customary international law and treaties—enslavement, imprisonment or other severe deprivation of physical liberty, torture, rape, sexual slavery, and other forms of servitude. These well-settled crimes against humanity already meet *nullum crimen* requirements, thereby imputing commensurate notice of the wrongfulness and criminal character of such conduct. Additionally, the serious nature of the human rights violations underlying forced marriage, some of which are *ius cogens*, combined with the ICC’s statutory duty to apply and interpret the law so that it is consistent with internationally recognised human rights and without adverse distinction,<sup>128</sup> also militate in favour of a finding that *nullum crimen* is satisfied.

Despite the jurisprudence both prior to and within the *Ongwen* case, these ICC Trial and Appeals Chamber judicial conclusions on *nullum crimen* were

122 ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-1882-Conf, Appeals Chamber, Prosecution Response to Defence Appeal Brief, 21 October 2021, paras 562–564 (hereafter *Ongwen* Prosecution Response to Defence Appeal Brief).

123 *Ongwen* Appeals Judgment, *supra* note 1, para. 1019.

124 *Ibid.*

125 *Ibid.*, para. 1024.

126 *Ibid.*

127 *Ongwen* Appeals Judgment, *supra* note 1, para. 1015.

128 Rome Statute, *supra* note 19, Article 21(3).

not necessarily pre-ordained. Numerous international criminal law experts concur with jurisprudential holdings that forced marriage as an ‘other inhumane act’ fulfils the relevant *nullum crimen* criteria.<sup>129</sup> Others disagree, contending that ‘other inhumane acts’ prosecutions violate or jeopardise defendants’ due process rights.<sup>130</sup> Still others do not view forced marriage as a distinct harm, arguing that it is subsumed in enslavement, for example.<sup>131</sup> This debate is not surprising: courts struggle to balance concerns regarding ‘fair warning’ or ‘reasonable foreseeability’ in the criminalisation of specific acts, the subjectivity of an accused’s understanding of the content or scope of even explicit criminal provisions, legislative and judicial interpretation of the ‘essence of the offense’, and the importance of weighing interests and harms vis-a-vis the accused and the victims.<sup>132</sup>

While acknowledging the perils of international courts’ application of evolving contemporary norms to past criminal conduct, experts and human rights courts have observed that even relatively novel applications of legality standards by international criminal judges ‘have not infringed the higher-order

- 129 See, e.g., M. Frulli, ‘Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a “New” Crime against Humanity’, 6(5) *Journal of International Criminal Justice* (2008) 1033–1042 at pp. 1039–1040, DOI: 10.1093/jicj/mqn063; M.P. Scharf and S. Mattler, ‘Forced Marriage: Exploring the Viability of the Special Court of Sierra Leone’s New Crime Against Humanity’, *Case Research Paper Series in Legal Studies Working Paper-05-35* (October 2005), p. 6; Oosterveld, ‘Legal Advances’, *supra* note 69, pp. 143–148; S. Wharton, ‘The Evolution of International Criminal Law: Prosecuting “New” Crimes before the Special Court for Sierra Leone’, 11(2) *International Criminal Law Review* (2011) 217–239 at p. 232, DOI: 10.1163/157181211X559662; M.A. Wetherill, *Judicial Interpretation and Nullum Crimen Sine Lege at the International Criminal Court: An Exercise in Utilizing ‘Other Inhumane Acts’ under Crimes Against Humanity*, PhD thesis (University of Kent, Canterbury, 2019) pp. 56–100, <https://kar.kent.ac.uk/81863/>.
- 130 See, e.g., M.C. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, Cambridge, 2011), p. 262; J. Lincoln, ‘*Nullum Crimen Sine Lege* in International Criminal Tribunal Jurisprudence: The problem of the residual category of crime’, 7(1) *Eyes on the ICC* (2010) 137–155.
- 131 See, e.g., N.A. Goodfellow, ‘The Miscategorization of “Forced Marriage” as a Crime against Humanity by the Special Court for Sierra Leone’, 11(5) *International Criminal Law Review* (2011) 831–867 at pp. 866–867; P. Viseur Sellers, ‘Wartime Female Slavery: Enslavement?’, 44 *Cornell International Law Journal* (2011) 115–142 at p. 135; H. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (Oxford University Press, Oxford, 2014) at p. 129.
- 132 See A. Rychlewska, ‘The *Nullum Crimen Sine Lege* Principle in the European Convention of Human Rights: the Actual Scope of Guarantees’, 36 *Polish Yearbook of International Law* (2016) 163–208, DOI: 10.7420/pyil2016h.

principles underlying the [*nullum crimen*] prohibition'.<sup>133</sup> As one such scholar, Van Schaack, argues:

Today's defendants were on sufficient notice of the foreseeability of ICL jurisprudential innovations in light of extant domestic penal law, universal moral values expressed in international human rights law, developments in international humanitarian law and the circumstances in which this law has been invoked, and other dramatic changes to the international order and to international law brought about in the postwar period ... [Any] lingering concerns about the rights of the defendants can and should be mitigated by sentencing practices.<sup>134</sup>

Other scholars express reservations about the validity of this approach in safeguarding defendants' rights, calling for 'predictability, not interpretive adventurism' and cautioning the ICC to avoid 'victim-focused teleological reasoning' which may result in overly-wide crime definitions.<sup>135</sup>

Ongwen pressed the question of *nullum crimen* for forced marriage as an inhumane act multiple times, and each time the relevant Chamber of the Court found the answer to be straightforward. ICC trial and appeal judges concluded that forced marriage satisfies the *nullum crimen* requirements applicable to the 'other inhumane acts' category of crimes against humanity.<sup>136</sup> The jurisprudence of international criminal tribunals is therefore coalescing around the legality of charging, prosecuting, and convicting forced marriage.

## 7 Conclusion

The existing enumerated crimes against humanity do not fully capture either the conduct comprising forced marriage or its harmful impacts on victims.<sup>137</sup> Forced marriage is greater than the sum of its common components—deprivation of relational autonomy and myriad human rights

133 B. Van Schaack, 'Nullum Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals', 97 *Georgetown Law Journal* (2008) 119–192 at p. 120.

134 *Ibid.*

135 See P. Akhavan, 'The Perils of Progressive Jurisprudence: The *Nullum Crimen Sine Lege* Principle in International Criminal Law', 75(1) *Current Legal Problems* (2022) 45–70 at p. 68 (see also pp. 66, 69–70); D. Robinson, 'The Identity Crisis of International Criminal Law', 21(4) *Leiden Journal of International Law* (2008) 925–963 at p. 938 (see also pp. 925, 930–931, 937).

136 *Ongwen* Trial Judgment, *supra* note 1, paras 2743–2751; *Ongwen* Appeals Judgment, *supra* note 1, para. 1019.

137 *Ongwen* Trial Judgment, *supra* note 1, para. 2750.

abuses—because of the harms flowing from forced conjugal relationships and the children attached to them. The open-ended category of ‘other inhumane acts’ constitutes the crime against humanity that best encapsulates the myriad contours, diversified contexts, intersectional abuses, and multi-dimensional harms characterising forced marriage. The authors argue that it is now settled jurisprudence that forced marriage falls under this crime, a view supported by various international criminal courts and tribunals, including the ICC in the *Ongwen* Trial and Appeals judgments.

The clarification of international criminal law on forced marriage stemming from the *Ongwen* case will be helpful for the forthcoming judicial reasoning in the ICC’s *Al Hassan* case.<sup>138</sup> It will also inform the consideration by states of the International Law Commission’s draft Crimes Against Humanity Convention.<sup>139</sup> That draft Convention replicates the Rome Statute’s crimes against humanity provision, including the listing of ‘other humane acts’ as a residual category.<sup>140</sup> In the April 2023 interactive discussions within the Sixth Committee of the United Nations on the draft convention, the United Kingdom recommended that forced marriage be considered for explicit inclusion in the list of enumerated crimes against humanity as a result of the *Ongwen* judgments.<sup>141</sup> Canada similarly recommended that forced marriage be considered for direct listing as a crime against humanity.<sup>142</sup> The authors also support such an amendment to the draft treaty, given the preponderance of case law on the distinct nature and harms of forced marriage. Explicit recognition would help to overcome continued submissions, such as those from the defence in the *Ongwen* case, contesting the existence of the crime of forced marriage as an ‘other inhumane act’ and raising *nullum crimen* arguments. While it is acknowledged that there is a significant debate among countries about the viability and content of such a treaty,<sup>143</sup> this type of amendment may be among the most palatable, given the strength of the jurisprudence.

138 *Al Hassan* Confirmation of Charges, *supra* note 88.

139 International Law Commission, *Draft Articles on Prevention and Punishment of Crimes Against Humanity*, in International Law Commission, *Report on the Work of its Seventy-First Session*, (UN Doc A/74/10) (2019).

140 *Ibid.*, Article 2(1)(k).

141 United Nations, *Delegates Grapple with Definition of Crimes against Humanity That Supports Future Development, Has Legal Certainty, as Sixth Committee Continues Resumed Session* (UN Doc. GA/L/3680, 11 April 2023), available online at <https://press.un.org/en/2023/gal3680.doc.htm> (accessed 20 May 2023).

142 *Ibid.*

143 L. Sadat and M. George, ‘An Analysis of State Reactions to the ILC’s Work on Crimes Against Humanity: a Pattern of Growing Support’ 6(2) *African Journal of International Criminal Justice* (2020) 162–190 at pp. 165–187.

This recommendation also raises the question of whether the Rome Statute should be amended to explicitly include ‘forced marriage’ as a crime against humanity and war crime, positioned with the other listed sexual and gender-based crimes. The definition of ‘forced marriage’ could be drawn from the *Ongwen* jurisprudence, namely the compulsion ‘of a person to enter into a conjugal union with another person by the use of physical or psychological force, or threat of force, or by taking advantage of a coercive environment’.<sup>144</sup> Such a definition should be gender-neutral and encompass different circumstances of forced marriage. Implementing this amendment would help to more directly reflect the gravity and widespread nature of the crime of forced marriage.

As Stacey Hynd has written, ‘[f]orced marriage corrupts and perverts the social institution of marriage, creating a form of conjugal disorder that threatens society’.<sup>145</sup> This was confirmed in a February 2023 report by the Office of the High Commissioner for Human Rights on the adverse impact of forced marriage on girls and women: ‘In all contexts, the essential drivers of forced marriage are patriarchal ideologies and structures, which subjugate women and girls and violate their human dignity and rights’.<sup>146</sup> Victims of forced marriage, used to maintain and prolong conflicts and oppressive regimes, suffer most from this continuing crime that has life-long effects on them and their children. The consideration of and reasoning on forced marriage within the *Ongwen* case has demonstrated the importance of addressing this egregious offence, the breadth of the long-lasting and devastating harms resulting from it, and the legal arguments that underpin its prohibition and associated enforceability.

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<sup>144</sup> *Ongwen* Appeals Judgment, *supra* note 1, para. 1024.

<sup>145</sup> S. Hynd, ‘To Be Taken as a Wife is a Form of Death’: The Social, Military, and Humanitarian Dynamics of Forced Marriage and Girl Soldiers in African Conflicts, c. 1990–2010’, in A. Bunting, B.N. Lawrence and R.L. Roberts (eds.), *Marriage by Force? Contestation over Consent and Coercion in Africa* (Ohio University Press, Athens, OH, 2016) pp. 292–312 at p. 297. See also M. O’Brien, ‘Gender Dimensions of Forced Marriage in International Criminal Law’ in I. Rosenthal, V. Oosterveld and S. SáCouto (eds.), *Gender and International Criminal Law* (Oxford University Press, Oxford, 2022), pp. 212–222 at pp. 227–229.

<sup>146</sup> Office of the High Commissioner for Human Rights, *Adverse impact of forced marriage on the full and effective enjoyment of all human rights by all women and girls* (A/HRC/52/50) (2 February 2023) p. 1.

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