

BEYOND LEGALITY: THE HISTORICAL DISREGARD OF THE PRINCIPLE OF LEGALITY AND ITS IMPACT ON FORCED MARRIAGE PROSECUTION IN INTERNATIONAL CRIMINAL LAW

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ABSTRACT

The principle of legality, a fundamental theme of international criminal law, emphasises that an individual should not be punished for an offence that is not defined under the law. Increasingly, international criminal courts and tribunals are disregarding this principle through extending crimes by analogy, an approach that is not supported by the principles of international criminal law. One area where this approach is evident is in the prosecution of the crime of forced marriage, which has never been explicitly proscribed by any of the statutes of international criminal tribunals/courts. This contribution first examines the views of the Nuremberg and Tokyo tribunals to come to grips with the latter's approach to the principle of legality. Subsequently, a brief analysis of the International Criminal Court (ICC), the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) is conducted to highlight a consistent pattern of disregarding the principle of legality. When compared to the Nuremberg and Tokyo tribunals, the approach of these three courts is unique in that the latter have not classified forced marriage as a distinct crime, choosing instead to include it under crimes against humanity, seemingly suggesting that the principle of legality is not undermined. However, this contribution underscores that this approach is still a violation of the principle of legality. It is argued that the extension of crimes against humanity by analogy represents a continuation of challenges observed by the Nuremberg and Tokyo tribunals concerning the disregard of the legality principle and that the ongoing prosecution of forced marriage in the absence of a specific criminal provision is a violation of this principle.

Keywords: Crimes against humanity; forced marriage; international criminal law; individual

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criminal responsibility; principle of legality; *nullum crimen sine lege*

1 Introduction

This contribution provides a focused exploration of the principle of legality within international criminal law (hereafter “ICL”), drawing from its origins at the Nuremberg and Tokyo tribunals.¹ The principle of legality maintains that individuals should face punishment only for offences explicitly defined by law. A significant departure from this principle is observed in the prosecution of forced marriage within contemporary international criminal courts and tribunals. This contribution highlights this departure by examining the foundation of such prosecutions since the Nuremberg and Tokyo tribunals. This introductory section examines the essence of the principle of legality and its paramountcy in ICL. Additionally, the discussion briefly alludes to challenges posed by crimes, such as forced marriage, highlighting how the prosecution thereof violates the principle of legality.

The principle of legality is a fundamental element underpinning ICL and a central theme of the Rome Statute of the International Criminal Court, 1998 (hereafter “Rome Statute”)² establishing the International Criminal Court (hereafter “ICC”). It is also a principle of international human rights law (hereafter “IHRL”), which is also applied by the ICC.³ Various IHRL treaty provisions, including article 7(2) of the African Charter on Human and Peoples’ Rights, 1986 and article 15 of the International Covenant on Civil and Political Rights, 1966, entrench this principle in definite terms.⁴ This principle emphasises that an individual should not be punished for an offence that is not defined by law.⁵ ICL forbids the retroactive prosecution and punishment of crimes.⁶ The Latin term for this principle is *nullum crimen nulla poena sine lege*.⁷

The principle of legality is recognised by article 22 of the Rome Statute,⁸ which reads as

¹ Cassese 2009: 443, 559. The term “Nuremberg trials” includes different military tribunals. The major war criminals (the highest ranking political and military leaders) were tried before the International Military Tribunal (IMT), established by The London Charter of the International Military Tribunal (1945). Subsequently, the United States of America (USA) created a national military tribunal (USMT) under Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (1945) to try a series of other selected war criminals (“follow-up trials”).

² Article 22 of the Rome Statute of the International Criminal Court, 1998.

³ *Idem* art 21 provides that applicable law includes “applicable treaties and the principles and rules of international law”.

⁴ Article 7(2) of the African Charter on Human and Peoples’ Rights, 1986; art 15 of the International Covenant on Civil and Political Rights, 1966.

⁵ Article 22 of the Rome Statute of the International Criminal Court, 1998.

⁶ Schabas 2011: 73.

⁷ Stahn 2019: 10.

⁸ Article 22(2) of the Rome Statute.

follows:

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.

The *nullum crimen nulla poena sine lege* maxim encapsulates four concepts that emphasise that the law must be clear, accessible, precise and foreseeable.⁹ These concepts include the principle of written law (*nullum crimen sine lege scripta*); the principle of non-retroactivity (*nullum crimen sine lege praevia*); the principle of specificity and certainty (*nullum crimen sine lege certa*); and the prohibition of analogy (*nullum crimen sine lege stricta*).¹⁰ These four concepts are linked to and strengthen each other.¹¹ This interconnectedness protects the accused from an unfair trial as it provides legal certainty that they are being prosecuted for a crime recognised by existing law at the time of its commission.¹² The principle of legality reinforces the respect for ICL by ensuring not only that the accused receives fair notice, but also certainty that the act committed is a criminal act.¹³

The principle of legality demands that the law must be sufficiently clear, defined and binding. In addition, article 22(2) of the Rome Statute requires that the law must be strictly construed and not extended by analogy.¹⁴ The courts run the risk of violating article 22(2) if they do not interpret the law strictly, if they interpret provisions of ICL statutes beyond their original scope or assign unintended meanings to such ICL provisions.¹⁵ One scholar has noted that “a chamber should construe a provision in a manner that favours respect for the principle of legality, to the extent this is possible”.¹⁶ Another view adds that “the principle of legality

⁹ Stahn 2019: 11.

¹⁰ Grabert 2015: 11. Within these four concepts the principle of legality asserts that the law should be clear, precise, certain, and specific. Although these terms are synonymous, they are slightly different. Clarity means that the definition of the crime should be understood by both the accused and the public; precision - the definition of a crime should leave no room for misinterpretation or ambiguity about the prohibited conduct; specificity – the definition of a crime should delineate clearly the elements of a crime, avoiding vagueness; certainty – the law should be predictable. Individuals should be able to know and understand with certainty what conduct constitutes a crime and what the potential consequences are. The principle of legality safeguards individuals from arbitrary prosecution and ensures justice is applied fairly.

¹¹ *Ibid.*

¹² Stahn 2019: 11.

¹³ *Idem* at 11–12.

¹⁴ Article 22(2) of the Rome Statute.

¹⁵ Grabert 2015: 12.

¹⁶ Schabas 2010: 407.

imposes on criminal judges a duty of interpretative restraint and significantly limits the scope for dynamic interpretation to the detriment of an accused”.¹⁷ Legal certainty therefore requires that the law needs to be clearly defined and accessible, and that the outcome is predictable. Moreover, the eventual shortcomings in the codified provisions of ICL statutes cannot be fixed by judges on the bench. This should not be 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.

In prosecuting international crimes, international criminal courts/tribunals are increasingly being confronted by accounts of atrocious conduct that are not explicitly proscribed by enabling statutes. One such scenario pertains to the conduct of forced marriage, a crime that is not explicitly criminalised by various ICL statutes.¹⁸ Nevertheless, such acts have been prosecuted before international courts, where some individuals have been convicted and punished. Increasingly, therefore, international criminal courts and tribunals resort to interpreting existing crimes and extending their interpretation by analogy to accommodate crimes not originally covered by ICL statutes.¹⁹ But is the tendency to disregard the principle of legality a new phenomenon or is it a standpoint that can be traced back historically? This question is worth interrogating, and it is against this backdrop that this contribution examines the approach of the Nuremberg and Tokyo tribunals to come to grips with these international military tribunals’ approach to the principle of legality. The study then briefly examines the more recent approach of the International Criminal Court (hereafter “ICC”), the Special Court for Sierra Leone (hereafter “SCSL”) and the Extraordinary Chambers in the Courts of Cambodia (hereafter “ECCC”), with particular focus on their approach to the crime of forced marriage.

In the next part, this contribution analyses the application of the principle of legality by some international criminal courts and tribunals. This part of the study gently introduces readers to the principle of legality by delving into the early discourse and perspectives on it,

¹⁷ Grabert 2015: 12.

¹⁸ Article 7 of the Rome Statute of the International Criminal Court, 1998; art 7 of the Rome Statute: Elements of Crimes of the International Criminal Court, 2010; art 5 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 2004; art 2 of the Statute of the Special Court for Sierra Leone, 2002.

¹⁹ Galand 2019: 117 observes that *ad hoc* tribunals faced allegations of introducing novel offences, such as war crimes and crimes against humanity. This was accomplished through the interpretation of these undefined crimes using customary international law and by providing justification for prosecuting these as crimes under international criminal law. Furthermore, Darcy 2010: 127 points out that, during the commission of war crimes, these offences were not explicitly defined, and that there was insufficient evidence in customary international law. However, despite these challenges, the prosecution of war crimes has contributed to the development of a robust body of jurisprudence on the subject.

including the relevant insights from justices at the Nuremberg and Tokyo tribunals. The next part takes a look at the principle of legality by briefly inquiring into the different perspectives of the judges from the Nuremberg and Tokyo tribunals. The discussion also explores the judges' thoughts on the significance of the principle of legality and its pivotal role in criminal trials.

In the third part, the contribution provides readers with a foundational understanding of historical origins and early discussions of the principle of legality. This part explores the principle of legality as observed by the Nuremberg and Tokyo tribunals. This includes an examination of the theoretical basis that birthed the principle, an exploration of how the formulation of crimes in the Nuremberg and Tokyo statutes (or charters) contributed to shaping the concept regarding the principle of legality, and a critical analysis of how these tribunals dealt with the principle of legality.

The fourth part scrutinises the principle of legality within the context of forced-marriage cases within the ECCC, ICC and SCSL. This part assesses whether these contemporary tribunals are repeating patterns established with regard to the application of the legality principle by its predecessors, the Nuremberg and Tokyo tribunals.

The contribution then concludes in the final part by presenting the findings derived from this study. This part offers insights on the principle of legality before international criminal courts/tribunals and provides a perspective on the compliance with, evolution of or departure from the principle as observed across the courts and tribunals investigated.

2 The principle of legality: The early stages

The principle of legality was first mentioned by the Nuremberg International Military Tribunal (hereafter “Nuremberg IMT”) in the decision of *United States v Göring*,²⁰ with the court stating that “the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice”.²¹ The tribunal referred to the principle of legality as merely a rule of justice.²² This principle entails that courts should not prosecute prohibited conduct if the act is not considered criminal by the law that existed at the time of the conduct.²³ The tribunal emphasised that “the maxim had no application to facts before it”.²⁴ This statement seemed to suggest that the IMT should have ignored the principle at the time since it was merely a

²⁰ *United States v Göring* [1947] Nuremberg IMT (1 Oct 1946).

²¹ *Ibid.*

²² Acquaviva 2014: 602.

²³ Darcy 2018: 208; *United States v Göring* [1947] Nuremberg IMT (1 Oct 1946).

²⁴ *United States v Göring* [1947] Nuremberg IMT (1 Oct 1946).

“principle of justice”.²⁵ This statement is interpreted in a manner that seems to suggest a disregard for the principle of legality. Nonetheless, it is more likely that the tribunal meant that existing legal principles did not provide a sufficient basis to address the horrific crimes committed by the Nazi regime. This highlights the need to adapt legal principles in such circumstances, while still upholding the fundamental rules of justice.

This tendency to ignore the *nullum crimen sine lege* principle was picked up by Justice Pal of India.²⁶ Justice Pal asserted that the International Military Tribunal for the Far East (hereafter “IMTFE”), or the Tokyo tribunal, should not formulate new crimes that were not considered as such by the law at the time the accused committed the prohibited act.²⁷ He stated that if this were to be the case, “the Tribunal will not be a ‘judicial tribunal’ but a mere tool for the manifestation of power”.²⁸ Justice Pal was concerned that the Allied states could ignore the principle of justice by exercising their legislative and judicial authority in the military courts they established.²⁹ This view was criticised by Lord Wright of Dursley, a British Appeal Court judge, who argued that all crimes mentioned in the Nuremberg and Tokyo Charters were recognised as crimes in international law.³⁰ Therefore, the World War II trials were fairly prosecuted.³¹ In response, this argument, was rejected by Justice Pal.³²

Another critical issue that arose regarding the principle of legality was the requirement under the Nuremberg Charter that all proceedings be conducted in English, French and Russian³³ and that the decisions be printed in all three languages. Unfortunately, the French version differed slightly from the English and Russian versions.³⁴ For example, in the French version of the *United States v Altstoetter* judgment, reference to justice was abandoned, and *nullum crimen* was merely considered as a rule that does not bind sovereign states.³⁵ The French version states that “*nullum crimen sine lege* ne limite pas la souverainete’ des États; elle ne formule qu’une règle généralement suivie”.³⁶ The English version states that “the

²⁵ Van Schaack 2008: 126.

²⁶ Gallant 2009: 1.

²⁷ *United States v Araki* [1948] IMTFE (4 Nov 1948) per the dissenting opinion of Pal J.

²⁸ *Ibid.* See, also, Galand 2019: 135.

²⁹ See, generally, Gallant 2009: 1. See, also, Galand 2019: 135.

³⁰ Gallant 2009: 1–2.

³¹ *Ibid.* See, also, Lord Wright 1946: 40–41.

³² *Ibid.* See, also, *United States v Araki* [1948] IMTFE (4 Nov 1948).

³³ Article 25 of the Nuremberg Charter provides: “All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.”

³⁴ Acquaviva 2014: 602–603.

³⁵ *Ibid.* See, also, *United States v Altstoetter* [1947] USMT (4 Dec 1947).

³⁶ Acquaviva 2014: 602.

nullum crimen sine lege does not limit the sovereignty of states: it merely formulates a rule that is generally followed”.³⁷ The French phrasing of the principle of legality therefore implied that the Allied nations were permitted to override an individual’s fundamental human rights, such as the right to due process during trials.³⁸ The French version is said to have been formulated by Nazi leaders because they did not consider *nullum crimen sine lege* to be a principle of justice.³⁹ The Nazi authorities had an idea of which criminal conduct to be permitted and which to be ignored; according to them, this ought to have little to do with codification.⁴⁰ Justice Röling from the Netherlands adopted the French version at the IMTFE in his dissenting opinion by ruling that:⁴¹

If the principle of “*nullum crimen sine praevia lege*” were a principle of *justice*, ... the Tribunal would be bound to exclude for that very reason every crime created in the Charter *ex post facto*, it being the first duty of the Tribunal to mete out justice. However, this maxim is not a principle of justice but a rule of policy, valid only if expressly adopted, so as to protect citizens against arbitrariness of courts, as well as against arbitrariness of legislators.

Thus, what started merely as rule of policy that had to take a backseat for justice to be meted out has now become an established principle in international criminal justice. Despite its history as discussed in this part, the principle of legality has evolved into an essential concept embraced by the Nuremberg and Tokyo tribunals. However, in some proceedings, the international criminal courts and tribunals appear hesitant to adhere to this principle reminiscent of the challenges faced by the historic Nuremberg and Tokyo tribunals. The next part demonstrates how the principle of legality featured in the discussions surrounding the creation of the IMT.

3 The Nuremberg and Tokyo military tribunals

The purpose of this short part is to prepare the reader to engage with the principle of legality. Additionally, this part looks at the parties involved in formulating the principle; considers why the principle of legality arose in ICL originally; and why it is important to discuss the principle of legality in the paragraphs that follow.

³⁷ *Ibid.* Gallant 2009: 2.

³⁸ Gallant 2009: 2; Acquaviva 2014: 602–603.

³⁹ Gallant 2009: 2–3. See, also, *United States v Altstoetter* [1947] USMT (4 Dec 1947).

⁴⁰ *Ibid.*

⁴¹ Gallant 2009: 3. See, also, IMTFE Tokyo Records vol 109 at 5, 44–45 (4 Nov 1948) per separate opinion of Röling J.

It was only until the establishment of the Nuremberg IMT that the Allied states began holding war criminals responsible for atrocities committed during World War II.⁴² The Allied states were those countries that formed an international military alliance, namely Great Britain, the Soviet Union and the United States of America, to fight against the Axis powers, consisting of Imperial Japan, Italy and Nazi Germany.⁴³

The Nuremberg tribunal stated that the *nullum crimen sine lege* principle is not a limitation of sovereignty.⁴⁴ At the time, ICL was still in its infancy and neither states nor international organisations could use this principle against other states or international organisations.⁴⁵ Contrary to the French version, the English version of the Nuremberg case, in *United States v Göring*,⁴⁶ took a different view by stating that *nullum crimen sine lege* is a principle of justice recognised by many nations during World War II.⁴⁷ When drafting the Nuremberg Charter, the drafters thereof struggled with the issue of legality.⁴⁸ They were unsure whether the issue could be resolved by merely defining crimes listed in the Charter.⁴⁹ This became a challenge because the Charter did not explicitly mention the principle of legality in its text.⁵⁰ Despite this lack of clarity, the Nuremberg IMT was indeed bound by the principle of legality.⁵¹ This was confirmed by the IMT itself when it stated that the Nuremberg Charter and the Nuremberg trials complied with the principle of legality.⁵²

Nonetheless, unresolved issues regarding the application of this principle remained.⁵³ For example, with respect to the crime of aggressive war, it was difficult to prove that the act of aggressive war was a crime under customary international law for it to be prosecuted in the absence of treaty codification.⁵⁴ It was also difficult to prove that the act of aggressive war carried individual criminal responsibility for Nazi leaders considering that, prior to World War II, international law did not attach individual criminal responsibility to such acts.⁵⁵ It was further questionable whether all acts labelled as crimes against humanity or as war crimes were

⁴² See, generally, Gallant 2009: 69; Cryer *et al* 2010: 110.

⁴³ Carleton 1958: 216.

⁴⁴ *United States v Göring* [1947] Nuremberg IMT (1 Oct 1946).

⁴⁵ See, generally, Gallant 2009: 67; *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg* 20 Nov 1945–1 Oct 1946 Blue Series (1947–1948) vol 1 at 218.

⁴⁶ *United States v Göring* [1947] Nuremberg IMT (1 Oct 1946).

⁴⁷ Permanent Court of International Justice 1935: 169–173.

⁴⁸ Gallant 2009: 68.

⁴⁹ See, also, the Protocol Rectifying Discrepancy in the (Nuremberg) Charter, 1945.

⁵⁰ Gallant 2009: 68.

⁵¹ Cryer *et al* 2010: 112.

⁵² Schabas 2011: 6.

⁵³ Gallant 2009: 68.

⁵⁴ Schabas 2011: 6.

⁵⁵ Gallant 2009: 68. See, also, *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg* 20 Nov 1945–1 Oct 1946 Blue Series (1947–1948) vol 1 at 221.

recognised as such under international law at the time they were committed.⁵⁶ For this reason, at the time of the Nuremberg trials the principle of legality was vaguely conceived. The IMT and IMTFE trials significantly contributed to its development. The following paragraphs briefly discuss the laws and customs of war before the Nuremberg IMT trials and how, over time, the principle of legality was shaped.

3.1 Laws and customs of war before the Nuremberg IMT trials

As already pointed out above, the primary goal of this contribution is to underscore the challenges encountered by international criminal courts and tribunals when extending existing criminal provisions by analogy to prosecute undefined crimes as this practice results in a violation of the principle of legality. This part therefore looks at the violation of the laws and customs of war prior to the Nuremberg and Tokyo trials. The aim here is to demonstrate that the concept of individual criminal responsibility for crimes existed *before* the Nuremberg and Tokyo trials. This discussion gives an overview of the ideas regarding individual criminal responsibility and of the application of the principle of legality after World War I.

Towards the end of World War I, the Allied powers demanded that those responsible for violating the laws and customs of war during World War I ought to be prosecuted.⁵⁷ Accusations were made against the German, Austro-Hungarian, Bulgarian and Ottoman Empires (also known as the Central powers).⁵⁸ In response to these offences, the Allied powers established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (hereafter “the Commission”).⁵⁹ This Commission aimed to investigate who had initiated the war, who had committed war violations and to determine the tribunal responsible for prosecuting these acts.⁶⁰ At the Paris Peace Conference in Versailles in March 1919, the Allied Powers determined that the Central powers had initiated the war and that they had breached the rules of war.⁶¹ They further recommended that Kaiser Wilhelm II,

⁵⁶ Gallant 2009: 68. The tribunal never explored the issue further, the tribunal expressed that “from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes Against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes Against Humanity”.

⁵⁷ Van Schaack & Slye 2007: 21. See, also, Gallant 2009: 59, 70. The “laws and customs of war” refers to the established body of international law regulating armed conflict during World War II. This includes the treatment of prisoners of war, the use of certain weapons, and the targeting of civilians. The UNWCC seemed to agree that these wartime laws and customs existed. Since they existed, violations of these laws by the Axis powers against the Allied powers could be prosecuted as crimes.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Cryer *et al* 2010: 110.

the last German Emperor and King of Prussia during World War I, be prosecuted for command responsibility and for ordering crimes that violated the laws and customs of war.⁶² However, Allied powers faced internal disputes regarding the establishment of an international criminal tribunal to prosecute crimes not covered by such laws and customs of war.⁶³ The United States of America and Japan objected to the establishment of an international criminal tribunal, arguing that the establishment of such a tribunal could lead to the creation of *ex post facto* crimes and punishments.⁶⁴ Representatives of the United States of America contended that violation of “the laws and principles of humanity” could not be made an international crime in an international statute, asserting that these were moral breaches, but not legal offences.⁶⁵ The Japanese delegation also expressed its scepticism towards the existence of a penal law that was applicable to individuals who were found guilty.⁶⁶

Due to these concerns, the Allied powers reported that Kaiser Wilhelm II would be prosecuted under article 277 of the Treaty of Versailles for “supreme offense against international morality and the sanctity of treaties”.⁶⁷ However, this plan never materialised as the Kaiser sought asylum in Holland and the Dutch government refused extradition.⁶⁸ The Dutch government, citing article 227 of the Treaty of Versailles, asserted that the transgressions outlined in the Treaty lacked definition under any international statute.⁶⁹ In addition, under articles 228 and 229 of the Treaty of Versailles, German war criminals were to be prosecuted for war crimes before the Allied tribunal.⁷⁰ Initially, Germany refused to acknowledge articles 228 and 229, but a compromise was eventually reached, leading to trials of a dozen war criminals.⁷¹ Those found guilty were imprisoned for a short time and several were acquitted.⁷² It is clear that the Treaty of Versailles stood as a monument to victors’ justice.⁷³ The Treaty blatantly undermined the principle of legality to satisfy the vengeance of the Allied powers. This disregard for the principle of legality set the stage and continued to cast a shadow over later similar criminal prosecutions.

⁶² *Ibid.*

⁶³ Schabas 2011: 3.

⁶⁴ Cryer *et al* 2010: 110.

⁶⁵ Van Schaack & Slye 2007: 22.

⁶⁶ Cryer *et al* 2010: 110.

⁶⁷ Schabas 2011: 3.

⁶⁸ *Ibid.*

⁶⁹ *Ibid*; Cryer *et al* 2010: 110.

⁷⁰ Cassese 2009: 132.

⁷¹ Schabas 2011: 3.

⁷² Cryer *et al* 2010:110.

⁷³ Cassese 2009: 133.

Before World War II, the prevailing view (or *opinio juris*)⁷⁴ held that the laws and customs of war supported the prosecution and punishment of war crimes.⁷⁵ The Soviet Union, Great Britain and the United States of America acknowledged that individuals violating the laws and customs of war regulating the conduct of parties engaged in armed conflict (*jus in bello*) could be prosecuted in domestic courts or by military tribunals.⁷⁶ However, these agreements did not apply to violations of modern international law that go beyond the rules governing *jus in bello*.⁷⁷ This includes violations of *jus ad bellum*, the law concerning the use of force between states, as well as crimes against humanity, which are serious offenses committed against civilians within a state. Neither did these agreements extend to those who infringed the rules and laws of war placing humane limitations on the means by which war is conducted (*jus ad bellum*) or to those crimes committed inside states that were not regulated by the law of international armed conflict.⁷⁸ For example, the United States of America captured and prosecuted German saboteurs who committed acts of war inside its own borders.⁷⁹ Similarly, the Soviet Union prosecuted three Germans and one Soviet national for killing Soviet people with gas.⁸⁰ These examples highlight how, both before and during World War II, the concept of individual criminal responsibility was acknowledged for violating the rules and customs of war listed by the international community through customary international law.⁸¹ In 1943, the Allied powers and the United Nations created a United Nations War Crimes Commission (hereafter “UNWCC”) to investigate violations of laws and customs of war by Axis powers.⁸² The UNWCC seemed to accept that laws and customs of war were present and that violations of such customs perpetrated by Axis powers against Allied powers could be prosecuted as criminal offences. However, it was unclear to the UNWCC whether non-war related atrocities, such as Germans killing German nationals, could be prosecuted and, if so, what law would govern such acts.⁸³

⁷⁴ In *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ 1 para 77, the International Court of Justice held that *opinio juris* is “a belief that (a) practice is rendered obligatory by the existence of a rule of law requiring it”.

⁷⁵ See, generally, Gallant 2009: 69; Stahn 2019: 52.

⁷⁶ Gallant 2009: 69. In *Ex parte Yamashita* 327 US 1 (1946), the US Supreme Court referred to “a peace treaty extinguishing the right to try for war crimes”. See, also, Solis 2010: 14, 383 who defines *jus in bello* as the rules and laws governing the conduct of parties engaged in armed conflict or battlefield law.

⁷⁷ Gallant 2009: 69.

⁷⁸ *Ibid.* Solis 2010: 18, 22 defines the term *jus ad bellum* as referring to the rules and laws placing humane limitations on the means by which war is conducted.

⁷⁹ *Ex parte Quirin* 317 US 1 (1942).

⁸⁰ Gallant 2009: 69; Hicks 2013: 532.

⁸¹ See the Hague Convention, 1907; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1929; and the Geneva Convention Relative to Prisoners of War, 1929.

⁸² Gallant 2009: 70. United Nations War Crimes Commission 1948: 173, 175–177.

⁸³ *Ibid.*

The UNWCC found the issue of individual criminal responsibility for the act of aggressive war problematic.⁸⁴ Ultimately, the UNWCC failed to investigate past traditionally classified war crimes, including atrocities perpetrated against native German Jews by Nazi leadership.⁸⁵ Those who had violated the laws and customs of war by committing mass atrocities, such as attacking civilians, were formally tried for war crimes, for crimes against humanity and for genocide.⁸⁶ Therefore, this highlighted a gap in international law, where crimes remained unaddressed if they were not classified as traditionally defined war crimes. While World War II saw an increase in German war crimes falling under traditionally classified war crimes, one scholar argued for a broader understanding.⁸⁷ They pointed to the British Foreign Office's consideration of prosecuting war crimes committed against Germans and stateless persons within Allied territory, suggesting a potential expansion of the definition to encompass acts beyond those solely targeting civilians in occupied territories.⁸⁸

In addition, in 1915, France, Great Britain and Russia used the phrase “new crimes against humanity” to describe the atrocities committed against the Armenian and Greek nationals of the Ottoman Empire.⁸⁹ These crimes were recorded in the Treaty of Sèvres, signed in 1920, although the treaty was never ratified and ultimately did not take effect.⁹⁰ The Treaty of Lausanne, ratified in 1923, which replaced the Treaty of Sèvres as the peace treaty with Turkey, did not address the prosecution of those involved in the Armenian massacres. Notably, the Treaty of Sèvres, not the Treaty of Lausanne, offered amnesty for offenses committed during World War I.⁹¹ The UNWCC was also unable to investigate crimes such as the Armenian massacres because these were not seen as traditionally classified war crimes or as non-war atrocities.⁹² From this discussion, it is clear that even before the Nuremberg and Tokyo trials, certain crimes were viewed as warranting prosecution. One such notable example is the

⁸⁴ Gallant 2009: 71.

⁸⁵ *Ibid.*; Cryer *et al* 2010: 231.

⁸⁶ See De Menthon's opening speech of 17 Jan 1946 in *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg* 20 Nov 1945–1 Oct 1946 Blue Series (1947–1948) vol 5 at 89 where he acknowledged how, in international law, the laws and customs of war already emanated from crimes committed by spies and saboteurs. He used examples such as those of spies from the French resistance movement who had planned, coordinated, executed the sabotage of Nazi electrical power grids, transport facilities and telecommunications networks. At the time, De Menthon was the French chief prosecutor.

⁸⁷ Gallant 2009: 71.

⁸⁸ Kochavi 1998: 152–153.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* See, also, Cassese 2009: 134.

⁹¹ Cassese 2009: 134 n 13.

⁹² United Nations War Crimes Commission 1948: 173, 175–177. The Armenian massacres refer to the systemic mass killings and forced deportations of Armenians in the Ottoman Empire during World War I (often referred to as the Armenian Genocide). Many consider the Armenian Genocide to be the first genocide of the twentieth century.

Armenian massacres.⁹³ However, these crimes were not recognised as proper war crimes.⁹⁴ The decision to prosecute such crimes was therefore controversial and raised issues of legality. This created some legal uncertainty.

3.2 The London Conference regarding the Nuremberg IMT

This part looks at the events surrounding the London Conference aimed at deliberating the establishment of the IMT at Nuremberg. Before World War II, war crimes were listed as such by the Hague Convention, 1907 and the Geneva Conventions, 1929.⁹⁵ However, not all countries were part of these latter international treaties. Nevertheless, there was a general agreement among states that these treaties formed part of customary international law.⁹⁶ Nonetheless, acts of aggressive war committed by individuals were not viewed as crimes, even though there was a sense that such acts should be considered as crimes in international law.⁹⁷ The outcomes of the London Conference are crucial in defining the application of the principle of legality, particularly in addressing questions related to the definition of crimes. Additionally, the focus here extends to examining how the Allied powers involved in drafting the Nuremberg Charter approached the complexities of retroactive crimes and its definitions.

The London Conference was attended by representatives of all the Allied powers (Great Britain, France, the Soviet Union and the United States of America) between 26 June and 8 August 1945.⁹⁸ This event formally shaped the ideas surrounding retroactivity and the definition of crimes.⁹⁹ The delegates discussed the principle of non-retroactivity when defining the crime of aggressive war.¹⁰⁰ Several other issues came up for discussion as well, including whether to categorise the act of aggressive war as a crime in the Nuremberg Charter; whether judges at the Nuremberg IMT were empowered to classify and define the act of aggressive war as an international crime, whether the leaders of the Axis powers committed acts of aggressive war against their people and stateless persons in their own countries; and whether these crimes could be categorised as international crimes.¹⁰¹ At the Conference, it was agreed that the

⁹³ Schabas 2011: 6.

⁹⁴ *Ibid.*

⁹⁵ Geneva Convention Relative to Prisoners of War, 1929.

⁹⁶ Schabas 2011: 3.

⁹⁷ Cryer *et al* 2010: 313. See, also, Gallant 2009: 76, 78.

⁹⁸ Bassiouni 2011: 112. See, generally, Cassese 2009: 441; the Moscow Declaration on German Atrocities, 1943. During the Conference, Stalin, Churchill and Roosevelt participated as heads of state of their respective countries, namely the Soviet Union, Great Britain and the United States of America.

⁹⁹ Gallant 2009: 76.

¹⁰⁰ *Ibid.*

¹⁰¹ Stahn 2019: 97.

Nuremberg IMT would be bound by the Nuremberg Charter as drafted by the American delegates.¹⁰²

The United States proposed draft for the Nuremberg Charter dated 14 June 1945 stated that aggression, invasion, war crimes and other atrocities were criminal.¹⁰³ This proposal stated as follows:¹⁰⁴

In any trial before the International Military Tribunal, the tribunal shall be bound by the declaration of the parties to this Agreement that the following acts are criminal:

- (a) Atrocities and offenses against persons or property constituting violations of international law, including the laws, rules and customs of land and naval warfare.
- (b) Atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1 January 1933 in violation of any applicable provision of the domestic law of the country in which committed.
- (c) Invasion of another country by force or threat of force, or the initiation of war, in violation of international law.
- (d) Launching a war of aggression.
- (e) "International law" shall be taken to include treaties between nations and the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Subparagraph (e) of the draft is noteworthy. The main reason for its inclusion was that the American delegation did not want the Charter to be strictly construed as excluding crimes that conflicted with the consciousness of humanity.¹⁰⁵ Moreover, subparagraph (e) highlights the broader responsibility of every international criminal tribunal to uphold vital principles of international criminal justice, thereby safeguarding the integrity of the entire system.¹⁰⁶ The United States drafters, cognisant of an accused's defence that their actions did not constitute as crimes at the time of commission (ie, raising the defence of the crime being created *ex post facto*), sought to avoid these arguments concerning retroactive criminalisation. The Nuremberg Charter thus made concerted efforts to ensure that the prosecution of those accused of international crimes was based on codified law. Despite this, the principle of legality did not

¹⁰² See, generally, Gallant 2009: 78. See, also, Jackson 1949: 57.

¹⁰³ *Ibid.*

¹⁰⁴ Jackson 1949: 55, 57–58.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* See, also, the address of US Chief Prosecutor Robert H Jackson of 21 Nov 1945 in Jackson 1949: 293, 335, 373, 377–78.

necessarily bind political leaders and their representatives because international agreements did not necessarily regulate individual criminal conduct and the states' internal affairs. The Allied powers would not have agreed or consented to such interference with the concept of state sovereignty.¹⁰⁷

In order to avoid controversy, Allied powers could only draft retroactive criminal law to regulate the criminal conduct of the Axis powers; this was done to lend legitimacy to the Nuremberg and Tokyo tribunals.¹⁰⁸ Gros, who was a member of the French delegation,¹⁰⁹ agreed that German leaders should be punished for infringing the laws and customs of war.¹¹⁰ Gros added that the Nuremberg Charter should list only those crimes that are within the jurisdiction of the Nuremberg IMT. This would enable the tribunal to uphold the principle of legality because it would be able to deduce which conduct was criminal at the time of its commission.¹¹¹ The Tokyo IMTFE later supported the above view held by the French delegation.¹¹² Gros indicated that the Nuremberg IMT should be established based on the laws present at the time without creating new criminal penalties. This was reflected in the French draft of the Nuremberg Charter, which prohibited new crimes.¹¹³ The French draft insisted that a person who violated the laws and customs of war at the time should be tried and convicted.¹¹⁴ The English translation of the French proposal's draft article on the definition of crimes for the Nuremberg Charter dated 19 July 1945 appeared as follows:¹¹⁵

The Tribunal will have jurisdiction to try any person who has, in any capacity whatsoever, directed the preparation and conduct of:

- (i) the policy of aggression against, and of domination over, other nations, carried out by the European Axis Powers in breach of treaties and in violation of international law;
 - (ii) the policy of atrocities and persecutions against civilian populations;
 - (iii) the war, launched and waged contrary to the laws and customs of international law;
- and who is responsible for the violations of international law, the laws of humanity and the dictates of the public conscience, committed by the armed forces and civilian authorities in the

¹⁰⁷ Gallant 2009: 80–81. Zile 1964: 368, 378–379.

¹⁰⁸ Kelsen 1947: 164.

¹⁰⁹ See the comments of Gros of 2 Aug 1945 in Jackson 1949: 399.

¹¹⁰ Gallant 2009: 81. See, also, the comments of Gros of 19 Jul 1945 in Jackson 1949: 293, 295.

¹¹¹ See the comments of Gros of 19 and 25 Jul 1945 in Jackson 1949: 293, 295, 377–378.

¹¹² IMTFE Tokyo Records vol 105 at 56–57 (12 Nov 1948) per dissenting opinion of Pal J.

¹¹³ See, generally, Gallant 2009: 84. See, also, the comments of Gros of 25 July 1945 in Jackson 1949: 293, 373, 377–378; and the Draft Article on the Definition of Crimes Submitted by the French Delegation on 19 Jul 1945 published in *idem* at 377–378.

¹¹⁴ The French Draft Article on the Definition of Crimes in Jackson 1949: 293.

¹¹⁵ *Ibid.*

service of those enemy Powers.

Gros nonetheless objected to creating new crimes and to formulating individual criminal responsibility for new crimes, such as conspiracy to commit aggressive war, because this would amount to “*ex post facto* legislation”.¹¹⁶ According to the French delegation, the crime of an act of aggressive war did not carry individual criminal responsibility before World War II.¹¹⁷ By this argument, Gros sought to establish the principle in international law against formulating *ex post facto* crimes and legislation. He expressed the hope that, in the near future, international legislation against the act of aggressive war would carry penalties and impose individual criminal responsibility.¹¹⁸ He argued as follows:¹¹⁹

The subject was often up for discussion in the League of Nations. It is said very often that a war of aggression is an international crime, a consequence of which it is the obligation of the aggressor to repair the damages caused by his actions. But there is no criminal sanction. It implies only an obligation to repair damage. ... It may be a crime to launch a war of aggression on the part of a state that does so, but that does not imply the commission of criminal acts by individual people who have launched a war. When you say that a state which launches a war has committed a crime, you do not imply that the members of that state are criminals. We do not consider as a criminal violation the launching of a war of aggression. If we declare war a criminal act of individuals, we are going farther than the actual law.

The French insisted that the act of aggressive war should not be criminalised retroactively.¹²⁰ Also, it is essential to note that no other Western nation objected to new crimes, such as domestic or internal acts of barbarity, being included under traditional war crimes.¹²¹ These atrocious acts committed against civilians were eventually categorised as crimes against humanity in the Nuremberg Charter.¹²²

The United Kingdom representative, Chairman David Fyfe, insisted on a general agreement among Western nations on what crimes the Nuremberg IMT could prosecute.¹²³ Fyfe contended that it should not be left to the judges to decide what principles of international

¹¹⁶ See the comments of Gros of 25 Jul 1945 in Jackson 1949: 335.

¹¹⁷ *Idem* at 295, 328, 335 regarding comments of Gros of 19 and 23 Jul 1945.

¹¹⁸ Gallant 2009: 82. See the comments of Gros of 19 Jul 1945 in Jackson 1949: 295.

¹¹⁹ *Ibid.* See, also, the comments of Gros of 19 Jul 1945 in Jackson 1949: 297.

¹²⁰ See the comments of Gros of 25 July 1945 in Jackson 1949: 328, 334–335, 360.

¹²¹ *Idem* at 360.

¹²² See the London Agreement, 1945 with the Nuremberg Charter.

¹²³ Gallant 2009: 86.

law they could apply.¹²⁴

Fyfe mentioned that the tribunal would only prosecute Nazi “aggressive war crimes”.¹²⁵ Gros disagreed with Fyfe, contending that devising new crimes of aggressive war waged by individuals would amount to *ex post facto* legislation.¹²⁶ This disagreement between Gros and the majority of Allied delegates at the London Conference highlighted a key difference in how Allied delegates approached the issue regarding the principle of legality.¹²⁷ In response to Gros’s argument, the French and the Soviet delegates concurred on a draft that did not explicitly mention the principle of legality.¹²⁸ On 25 July 1945, the Soviet delegation suggested a redraft of the definition of crimes beginning as follows:¹²⁹

The following acts, designs or attempts at any of them shall be deemed crimes and shall come within the jurisdiction of the Tribunal:

- (a) Aggression against or domination over other nations carried out by the European Axis Powers in violation of treaties, agreements, and assurances;
- (b) Atrocities against civilian populations including murder and ill-treatment of civilians and deportation of civilians to slave labour, and persecutions on racial or religious grounds inflicted in pursuance of the aggression or domination referred to in paragraph (a) above;
- (c) Violations of the laws, rules and customs of war. Such violations shall include murder and ill-treatment of prisoners of war, atrocities, wanton destruction of towns and villages, and plunder.

Unlike the Soviet draft, which focused on listing specific crimes, Gros recommended the following slight alteration, namely that it “shall be deemed to be crimes coming within the jurisdiction of the Tribunal” because he wanted the Nuremberg Charter to determine specific crimes to be prosecuted by the tribunal.¹³⁰ However, he wanted the judges to decide on applicable law for these crimes.¹³¹ Furthermore, Gros wanted the Nuremberg Charter to

¹²⁴ *Idem* at 86–87. See, also, the comments of Sir David Maxwell Fyfe of 23 Jul 1945 in Jackson 1949: 328. David Maxwell stated: “I want to make clear in this document [the Nuremberg Charter] what are the things for which the Tribunal can punish the defendants. I don’t want it to be left to the Tribunal to interpret what are the principles of international law that it should apply. I should like to know where there is general agreement on that, clearly stated – for what things the Tribunal can punish the defendants. It should not be left to the Tribunal to say what is or is not a violation of international law.”.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ See nn 107 - 116, 119, 130, 136.

¹²⁹ See Redraft of Definition of Crimes as submitted by the Soviet Delegation on 25 Jul 1945 published in Jackson 1949: 373.

¹³⁰ *Idem* at 373, 377–378 for the comments of Gros on 25 Jul 1945; these comments addressed the English translation of the Soviet draft.

¹³¹ *Ibid.* See, generally, Gallant 2009: 89.

indicate what crimes should come before the tribunal.¹³² He pointed out that in terms of the Soviet draft, the tribunal could not decide whether the crimes contravened existing international law.¹³³ Therefore, his suggestion enabled article 6 of the Nuremberg Charter to become jurisdictional, being phrased to reflect that “the tribunal shall have jurisdiction to determine whether these acts are crimes under the relevant (international) law”. His suggestion would also enable the tribunal to address whether a crime prosecuted before the tribunal was *ex post facto*.¹³⁴

Major-General Iona Nikitchenko, a Soviet judge and delegate to the Nuremberg IMT, readily concurred with the French recommendation simply because the criminal acts listed under article 6 of the Nuremberg Charter established that an accused had committed a crime, thus, *not ex post facto*.¹³⁵ Gros’s amendment of the Soviet draft suggested that the tribunal should accept the crimes listed in article 6 without resorting to an independent investigation of international law.¹³⁶

On 31 July 1945, the American delegation released a draft definition of crimes as follows:¹³⁷

The Tribunal established by the (London) Agreement ... shall have power and jurisdiction to try and determine charges of crime against individuals who and organizations which acted in aid of the European Axis Powers and to impose punishments on those found guilty. The following acts, or any of them, are crimes coming within its jurisdiction for which there shall be individual responsibility... .

The American draft described the jurisdiction of the tribunal and empowered judges to have the right to decide what ICL regulated the accused’s criminal conduct.¹³⁸ The American draft also allowed the accused to argue that crimes were prosecuted *ex post facto*.¹³⁹ The final version of article 6 of the Nuremberg Charter listed and defined crimes agreed upon by all the

¹³² Gallant 2009: 378–379. See, also, the comments of Gros of 25 July 1945 in Jackson 1949: 378–379.

¹³³ Jackson 1949: 378–379.

¹³⁴ See the comments of Gros on 25 July 1945 in *idem* at 377–379.

¹³⁵ See *idem* at 382 regarding the comments of General Nikitchenko on 29 Jun 1945.

¹³⁶ *Idem* at 373. See, also, Gallant 2009: 89.

¹³⁷ See the Revision of Definition of Crimes submitted by American Delegation on 31 Jul 1945 published in Jackson 1949: 395. See, generally, Gallant 2009: 89. This was the first draft to add crimes against humanity. Eventually, the Nuremberg Charter was the first international document to codify crimes against humanity.

¹³⁸ See the comments of Gros of 25 Jul 1945 in Jackson 1949: 378–379. See, also, Gallant 2009: 89. Similarly, during the Tokyo IMTFE trials, judges, such as Röling, stated that art 5 of the IMTFE Charter was jurisdictional.

¹³⁹ IMTFE Tokyo Records vol 109 at 5, 44–45 (4 Nov 1948) per separate opinion of Röling J; *idem* vol 22 at 9–10, 105 (12 Nov 1948) per dissenting opinion of Bernard J; *idem* vol 105 at 33–34 (12 Nov 1948) per dissenting opinion of Pal J.

Allied delegates as follows:¹⁴⁰

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility... .

As seen above, the Nuremberg Charter exhibited ambivalence towards the principle of legality, a subject that would later become an important point of discussion during the Nuremberg trial. It is crucial to recognise that Allied powers were not subject to the jurisdiction of the Nuremberg Charter. This exemption was stated in its *Chapeau*, asserting that the Nuremberg IMT was created to punish crimes of aggression committed by Axis powers only.¹⁴¹ Additionally, by prosecuting the accused for crimes of aggression, the tribunal conformed with the principle of retroactivity.¹⁴² This ambiguity surrounding the principle of legality, as raised by the accused during the Nuremberg trial, will be further explored in the fourth part.

3.3 The creation of the International Military Tribunal for the Far East

This part briefly explores the inception of the IMTFE Charter that governed the Tokyo trials. It sheds light on the crucial players involved, identifies the signatories to the Charter, and

¹⁴⁰ See art 6 of the Nuremberg Charter, which provides as follows: “The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing; (b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators, and accomplices participating in the formulations or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.” See, also, *United States v Göring* [1947] Nuremberg IMT (1 Oct 1946), citing this provision.

¹⁴¹ Gallant 2009: 91. The introduction to the Nuremberg Charter refers to the “agreement for the prosecution and punishment of major war criminals of the European axis”.

¹⁴² Green 1962: 469, 471.

clarifies the primary purpose behind the creation of the IMTFE, namely to prosecute war criminals in the Far East. This discussion is crucial as it sets the stage for part four, where the discussion focuses on the application of the principle of legality during the Nuremberg and Tokyo trials.

The IMTFE was created by a special proclamation tabulated by the Supreme Allied Commander for the Far East, General Douglas MacArthur.¹⁴³ It was not created by an explicit international agreement between nations.¹⁴⁴ The Allied powers granted General MacArthur the authority to implement the terms of surrender based on the Potsdam Declaration signed by Japan.¹⁴⁵ The latter Declaration affirmed that “stern justice must be meted out to all war criminals including those who have visited cruelties upon our prisoners”.¹⁴⁶ As documented in the instruments of surrender, the primary signatories were the United States of America, China and Great Britain. Subsequently, other Allied nations ratified the instruments of surrender, namely Australia, Canada, France, the Netherlands, New Zealand and the Soviet Union.¹⁴⁷

The Tokyo Charter classified crimes in the same way as the Nuremberg Charter.¹⁴⁸ For example, similar to article 6 of the Nuremberg Charter, article 5 of the Tokyo Charter provided as follows with regard to the tribunal’s jurisdiction over persons and offences:¹⁴⁹

The Tribunal shall have the power to try and punish Far Eastern war criminals who as individual(s) or as members of organizations are charged with offenses which include Crimes Against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual criminal responsibility...

Nonetheless, the IMTFE was bound to apply the definitions of crimes listed in the Tokyo Charter, despite crimes being domestic or international law crimes at the time the criminal acts

¹⁴³ Stahn 2019: 64. See, also, the Special Proclamation by the Supreme Commander of the Allied Powers: Establishment of an International Military Tribunal for the Far East of 19 Jan 1946 available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (accessed 6 Jun 2024)

¹⁴⁴ Cassese 2003: 331.

¹⁴⁵ *Idem* at 332. See, also, Bassiouni 2011: 144.

¹⁴⁶ Cryer *et al* 2010: 115.

¹⁴⁷ *Ibid.* See, also, the Japanese Instrument of Surrender, 1945. See, also, Cassese 2003: 332; Cryer *et al* 2010: 115; and Kopelman 1991: 390–391. The IMTFE comprised of eleven justices compared to the four justices of the Nuremberg tribunal. Nine of the eleven judges came from Allied nations that had signed the instruments of surrender, namely Australia, Canada, France, New Zealand, the Netherlands, the United Kingdom, the United States of America and the Soviet Union; one was from the Philippines; and the last one from India. At the time, India was a member of the League of Nations, although it was still a colony of the United Kingdom. India and the Philippines were members of the Far Eastern Commission of the Allied nations. They were added to the IMTFE because the Commission declared that all its members should participate in the IMTFE.

¹⁴⁸ Bassiouni 2011: 144.

¹⁴⁹ See art 5 of the Charter of the International Military Tribunal for the Far East, 1946.

took place.¹⁵⁰

In navigating the complexities surrounding the principle of legality within the context of the establishment of the Nuremberg and Tokyo Charters, the third part of this discussion in revealed challenges faced by international military tribunals in attaching criminal responsibility for new, undefined crimes. The Nuremberg Charter, while demonstrating uncertainty toward the principle of legality, marked an essential moment in holding war criminals accountable for World War II atrocities. Preceding the Nuremberg and Tokyo trials, violations of the laws and customs of war were evident, highlighting that the concept of individual criminal responsibility had existed during and after World War I. Additionally, the London Conference played a crucial role in shaping the groundwork for the principle of legality, emphasising varying perspectives among Allied leaders on retroactive crimes and its definitions. Moreover, the creation of the IMTFC added complexities to the developing field of international criminal justice. Similar to the Nuremberg Charter, the Tokyo Charter defined crimes and established individual criminal responsibilities for new, previously undefined crimes, such as crimes against humanity. This reflected ongoing efforts to establish legal foundations for prosecuting war criminals.

The next part of this contribution offers an in-depth examination of the uncertainties surrounding the principle of legality, especially in light of the debates and challenges witnessed during the Nuremberg and Tokyo trials.

4 The application of the principle of legality at the Nuremberg and Tokyo trials

This part of the discussion examines how the Nuremberg and Tokyo tribunals navigated the principle of legality. It scrutinises the approach adopted by both tribunals when confronted with defendants' concerns regarding retroactive crimes and punishments. The focus is on whether these tribunals opted to expand existing criminal codes or statutes by analogy to accommodate certain undefined crimes committed during World War II.

At the Nuremberg trials, the *nullum crimen sine lege* principle was raised by the accused charged with executing aggressive war. The latter filed for a joint pre-trial motion claiming that aggressive war charges in the Nuremberg Charter were created *ex post facto*.¹⁵¹ The

¹⁵⁰ *Ibid.*

¹⁵¹ The accused here were Alfred Jodl, Hans Frank, Herman Göring and Wilhelm Frick. See the Motion Adopted by All Defence Counsel (19 Nov 1945) in *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg* 20 Nov 1945–1 Oct 1946 Blue Series (1947–1948) vol 1 at 168–170; and the argument by Pannenbecker, chief counsel for Frick in *idem* vol 18 at 164. See, also, the comments of Gros in Jackson 1949: 295.

accused claimed that crimes against peace were the new penal law and that “other principles of a penal character contained in the Nuremberg Charter contradict the ‘*Nulla Poena Sine Lege*’”.¹⁵² They asserted that crimes against peace undermined customary international law, and requested that “the Tribunal direct that an opinion be submitted by internationally recognised authorities on international law on the legal elements of this trial under the Charter of the Tribunal” because the Nuremberg IMT comprised of judges from victorious countries.¹⁵³ The accused argued against the tribunal’s bench consisting exclusively of jurists from the Allied powers, reasoning that the Nuremberg tribunal was biased. The accused were of the view that the trials were a means through which Allied nations used international law for their own benefit to punish the Axis powers. Justice Pal later pointed out this unfairness during the Tokyo trials.¹⁵⁴

The accused also raised the issue of an individual being aware of the wrongfulness of their omission and commission in order for individual criminal responsibility to arise.¹⁵⁵ This objection was based on provisions of international treaties, such as the Hague Convention¹⁵⁶ and the Nuremberg Charter.¹⁵⁷ The Nuremberg IMT rejected the motion partly based on article 3 of the Nuremberg Charter which prohibited objections raised concerning the tribunal’s jurisdiction.¹⁵⁸ The tribunal ruled on three different grounds, which are discussed in more detail below. First, the tribunal ruled that it was bound by the Nuremberg Charter. Secondly, the tribunal pointed out that the Nuremberg Charter does not undermine the principle of legality because the crimes listed in the Charter were already part of international law when the accused had acted. Thirdly, the tribunal held that the principle of legality did not bind it.¹⁵⁹

With regard to the first and second ruling, the tribunal agreed with the contentions raised by the Chief Prosecutors, Robert H Jackson for the United States¹⁶⁰ and Roman Rudenko for the Soviet Union,¹⁶¹ that the Nuremberg Charter bound the tribunal and that the crimes listed

¹⁵² Motion Adopted by All Defence in *idem* vol 1 at 168–169. The accused argued that “no sovereign power has made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders”.

¹⁵³ *Idem* at 169–170.

¹⁵⁴ Gallant 2009: 150–151.

¹⁵⁵ Per Dr Jahrreiss, chief counsel for accused Alfred Jodl, in *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg* 20 Nov 1945–1 Oct 1946 Blue Series (1947–1948) vol 17 at 460.

¹⁵⁶ See arts 4–7 of the Hague Convention, 1907; and arts 2, 3, 4 and 6 of the Geneva Convention Relative to Prisoners of War, 1929.

¹⁵⁷ Article 6 (b) of the Nuremberg Charter.

¹⁵⁸ Motion Adopted by All Defence Counsel (19 Nov 1945) in *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg* 20 Nov 1945–1 Oct 1946 Blue Series (1947–1948) vol 1 at 168–170.

¹⁵⁹ *Idem* vol 18 at 164–165 per Chief Counsel for Wilhelm Frick.

¹⁶⁰ *Idem* vol 2 at 147 per opening statement of US Chief Prosecutor, Robert H Jackson.

¹⁶¹ *Idem* vol 7 at 148 per opening statement of USSR Chief Prosecutor, Roman Andreevich Rudenko. Rudenko

in the Charter were already viewed as international crimes *before* the Nazi accused had committed these acts.¹⁶² In his opening address, Jackson, argued passionately as follows:¹⁶³

But if it be thought that the Charter, whose declarations concededly bind us all, does contain new law I still do not shrink from demanding its strict application by this Tribunal. ... It is true, of course, that we have no judicial precedent for the Charter. But International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs. ... International Law is not capable of development by the normal process of legislation for there is no continuing international legislative authority. ... It grows, as did the Common Law, through decisions reached from time to time in adapting settled principles to new situations. The fact is that when the law evolves by the case method, as did the Common Law and as international law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error. ... Hence, I am not disturbed by the lack of judicial precedent for the inquiry we propose to conduct.

This argument by Jackson barred the tribunal from further engaging with the question of whether the principle of legality in international law could apply during the trials.¹⁶⁴ The tribunal found it unnecessary to question whether aggressive war and conspiracy to wage aggressive war were already crimes in international law before the establishment of the Nuremberg Charter.¹⁶⁵ Furthermore, the Nuremberg trials dashed the hope expressed by Gros, by stating that the Nuremberg Charter was an “exercise of the sovereign legislative power by the countries to which Germany unconditionally surrendered”.¹⁶⁶

In its second ruling, the tribunal added that the Charter is “not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, ... it is the expression of international law existing at the time of its creation”.¹⁶⁷ Jackson agreed with this, asserting that creating individual criminal responsibility stemmed from the legislation of the

insisted that the Nuremberg Charter “is to be considered an unquestionable and sufficient legislative act” and that the “principle *nullum crimen sine lege*, or to the principle that ‘a statute cannot have retroactive power,’ are not applicable because of the following fundamental, decisive fact: The Charter of the Tribunal is in force and in operation and all its provisions possess absolute and binding force.”

¹⁶² *Idem* vol 1 at 174.

¹⁶³ *Idem* vol 2 at 147 per opening statement of US Chief Prosecutor, Robert H Jackson.

¹⁶⁴ Bassiouni 2011: 152.

¹⁶⁵ *United States v Göring* [1947] Nuremberg IMT (1 Oct 1946) at 219.

¹⁶⁶ *Idem* at 218.

¹⁶⁷ *Ibid.*

victorious¹⁶⁸ and insisted that the Nuremberg Charter was resolute and binding.¹⁶⁹ The tribunal went on to discuss crimes against peace by reviewing several treaties, including the Briand-Kellogg Pact,¹⁷⁰ the Treaty of Versailles¹⁷¹ and the unratified Geneva Protocol,¹⁷² to decide whether individual criminal responsibility existed for the crime of waging aggressive war. The only treaty that fully addressed this aspect was the Treaty of Versailles, which attached individual criminal responsibility to planning or waging aggressive war.¹⁷³

One view held that an exception is permitted when creating retroactive legislation, namely,¹⁷⁴ that “retroactive law providing punishment for acts which were illegal though not criminal at the time they were committed”.¹⁷⁵ However, this view highlights the controversy surrounding the Nuremberg tribunal’s decision to retroactively establish individual criminal responsibility for new, undefined crimes and, thereby, undermining the principle of legality.¹⁷⁶ In its second ruling, the tribunal concluded that conspiracy and aggressive war were similar crimes.¹⁷⁷ It further compared crimes against peace and war crimes, and asserted that the principle of legality did not apply *in casu*.¹⁷⁸ Consequently, the tribunal found that international conventions did not attach individual criminal responsibility for war crimes committed during World War II.¹⁷⁹ Under customary international law, treaties, such as the Hague Convention, prohibited war crimes, but they did not consider it as criminal.¹⁸⁰ It seems that the Nuremberg tribunal equated the prohibition or illegality of war crimes with the criminality of war crimes.¹⁸¹

Pertaining to the third ruling, the tribunal explained that “*nullum crimen sine lege* is not a limitation of sovereignty but is in general, a principle of justice”.¹⁸² In other words, the principle of legality was overridden by the will of victorious nations to legislate.¹⁸³ Indeed, the

¹⁶⁸ Jackson 1949: 331.

¹⁶⁹ *Ibid.* Jackson asserted: “I am frank to say that international law is indefinite and weak in our support on that [individual criminal responsibility], as it has stood over the recent years. This definition seems to me to leave the Tribunal in the position where it could be argued, and the Tribunal might very reasonably say, that no personal responsibility resulted if we failed to say it when we are making an agreement between the four powers which fulfils in a sense the function of legislation.”

¹⁷⁰ The official name is the General Treaty for Renunciation of War as an Instrument of National Policy, 1928.

¹⁷¹ Treaty of Versailles, 1919.

¹⁷² See Preamble 2 of the Geneva Protocol, 1924. This document was only a draft as it never entered into force.

¹⁷³ Stahn 2019: 97.

¹⁷⁴ Gallant 2009: 116.

¹⁷⁵ *Ibid.*; Kelsen 1947: 165.

¹⁷⁶ Van Schaack 2008: 126. These crimes including crimes against humanity and conspiracy to wage aggressive war.

¹⁷⁷ *Ibid.*

¹⁷⁸ *United States v Göring* [1947] Nuremberg IMT (1 Oct 1946) at 219.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Idem* at 220–221.

¹⁸¹ Van Schaack 2008: 127–128.

¹⁸² *Ibid.*; *United States v Göring* [1947] Nuremberg IMT (1 Oct 1946) at 219.

¹⁸³ Van Schaack 2008: 126. See, also, Kelsen 1947: 164, who agreed with this view by asserting that the principle

tribunal recognised that Allied powers had the authority to disregard this principle and to create criminal law even if it would amount to *ex post facto* legislation.¹⁸⁴ The tribunal also endorsed the view that victorious nations had the right to set up a tribunal that was bound by crimes listed in the statute defined by those nations.¹⁸⁵ The tribunal asserted that the principle of legality does not protect criminal conduct that is morally reprehensible.¹⁸⁶ It added that the perpetrator “must know that he is doing wrong, and so far from being unjust to punish him, it would be unjust if his wrong were permitted to go unpunished”.¹⁸⁷ Legality has been described as a sacred moral principle that was not applicable at the Nuremberg IMT since the crimes against humanity and that of waging aggressive war were morally reprehensible and the need to convict the perpetrators was more important.¹⁸⁸ It appears that the *nullum crimen sine lege* principle gave way so that justice could be obtained for Nazi war crimes.

The judgments and dissenting opinions of the Tokyo trials are not as famous as those of the Nuremberg trials. However, the Tokyo tribunal faced similar issues regarding the principle of legality and non-retroactivity. Although the Tokyo tribunal drew inspiration from the Nuremberg tribunal’s approach to this issue, and the majority of the judges agreed with the Nuremberg tribunal regarding the issue of legality,¹⁸⁹ they were unable to reach consensus in this regard.¹⁹⁰ In endorsing the position of the Nuremberg tribunal, the Tokyo tribunal did not further explore the matter of legality.¹⁹¹ It confirmed the precedent set by the Nuremberg judgment as follows:¹⁹²

In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.

It is clear that the Tokyo tribunal did not want to revisit questions, such as individual criminal responsibility attached to waging aggressive war and the application of the principle of

of legality was not applicable in international law when the Nuremberg trials took place.

¹⁸⁴ Van Schaack 2008: 126.

¹⁸⁵ Cryer *et al* 2010: 113.

¹⁸⁶ *United States v Göring* [1947] Nuremberg IMT (1 Oct 1946) at 219.

¹⁸⁷ *Ibid.*

¹⁸⁸ Kelsen 1943: 544; Kelsen 1947: 165.

¹⁸⁹ *Ibid.*

¹⁹⁰ IMTFE Tokyo Records vol 22 at 48437–48439 (12 Nov 1948) per dissenting opinion of Bernard J.

¹⁹¹ *Idem* at 48439.

¹⁹² *Ibid.*

legality.¹⁹³ It held that the Tokyo Charter was binding and that the Tokyo Charter reflected accepted ICL present at the time of World War II.¹⁹⁴

However, some of the judges had differing opinions regarding *ex post facto* legislation. Justice Henri Bernard rejected the view that the Tokyo Charter undermined the principle of legality. He asserted that the crime of aggressive war was based on natural law that had existed long before World War II.¹⁹⁵ Justice Röling made an even more startling remark:¹⁹⁶

If the principle of “*nullum crimen sine praevia lege*” were a principle of justice ... the Tribunal would be bound to exclude for that very reason every crime created in the Charter *ex post facto*, it being the first duty of the Tribunal to mete out justice. However, this maxim is not a principle of justice but a rule of policy, valid only if expressly adopted, so as to protect citizens against arbitrariness of courts (*nullum crimen, nulla poena sine lege*), as well as against arbitrariness of legislators (*nulla crimen, nulla poena sine praevia lege*.)

In contrast, Justice Radhabinod Pal of India, in his lengthy dissenting opinion, found that the principle of legality was undermined¹⁹⁷ since the Tokyo tribunal had been established retroactively by victor states under international law to prosecute the crime of aggression.¹⁹⁸ He added that the tribunal did not have the power to create individual criminal responsibility for the crime of aggression.¹⁹⁹ Justice Pal argued as follows:²⁰⁰

The intention, in my opinion, is not to enact that these acts [named in art 5 of the IMTFE Charter] constitute crimes but that the crimes, if any with respect to these acts, would be triable by the Tribunal. Whether or not these acts constitute any crime is left open for determination by the Tribunal with reference to the appropriate law.

It is clear from the Nuremberg and Tokyo judgments that the rule against retroactive creation of criminal law was not expressly prohibited, although it was not accepted openly either.²⁰¹

¹⁹³ *Ibid.*

¹⁹⁴ *Idem* at 48437–48439.

¹⁹⁵ *Idem* at 145 per dissenting opinion of Bernard J.

¹⁹⁶ *Idem* vol 109 at 44–45 (12 Nov 1948) per separate opinion of Röling J.

¹⁹⁷ *Idem* vol 105 at 83 (12 Nov 1948) per dissenting opinion of Pal J.

¹⁹⁸ *Idem* at 56–57 per dissenting opinion of Pal J, who held that this applied “under the authority of international law, and not in the exercise of any sovereign authority. I believe, even in relation to the defeated nationals or to the occupied territory a victor nation is not a sovereign authority.”

¹⁹⁹ *Ibid.*

²⁰⁰ *Idem* at 33–34, 55 per dissenting opinion of Pal J.

²⁰¹ See above text to nn 160, 187 and 192 - 194.

5 Circumventing the principle of legality in forced-marriage cases

The discussion thus far emphasises the tendency of international criminal courts and tribunals to overlook the principle of legality by expanding current criminal provisions through analogy to encompass undefined crimes. This part aims to enhance the ongoing discourse by examining how the crime of forced marriage, not explicitly listed in existing criminal statutes, has resulted in prosecutions where offenders are charged with crimes of inhumane acts and sexual slavery. The courts and tribunals appear to extend the meaning of existing crimes by analogy, raising concerns about the principle of legality. This echoes a recurring pattern throughout history, where the principle of legality has been disregarded. While the Nuremberg and Tokyo tribunals assumed that the crimes prosecuted were already proscribed, contemporary tribunals include the crime of forced marriage in existing criminal provisions through extension of these existing crimes by analogy.

The principle of legality as outlined in articles 22 and 23 of the Rome Statute is fundamental in ICL, with the concepts of *nullum crimen* and *nulla poena* deeply rooted in customary international law.²⁰² At its core, article 22(2) embodies the principle of *nullum crimen sine lege* – in other words, it embraces the principle of no crime without law – and as a result, rejects retroactive punishment.²⁰³ The provision maintains the necessity for a precise interpretation of crime definitions, forbidding extensions by analogy and favoring the accused in case of ambiguity.²⁰⁴ This aligns with the customary fair-trial principle codified in human rights treaties, such as the Universal Declaration of Human Rights²⁰⁵ and the International Covenant on Civil and Political Rights.²⁰⁶ One scholar emphasises that the purpose of the principle of legality is to “enhance the certainty of the law, provide justice and fairness for the accused, achieve the effective fulfilment of the deterrent function of the criminal sanction, prevent abuse of power, and strengthen the application of the rule of law”.²⁰⁷ Prohibiting the extension of crimes by analogy, as articulated in article 22(2), reinforces the *nullum crimen sine lege praevia* principle,²⁰⁸ preventing the overreach of crime definitions and punishment beyond the Rome Statute.²⁰⁹ The International Law Commission’s commentary on the Draft Code of Crimes against the Peace and Security of Mankind, 1996 emphasises this point by

²⁰² Schabas 2010: 713. For the wording of art 22, see the main text to n 7 *supra*.

²⁰³ *Ibid*; Lind 2016: *passim*.

²⁰⁴ *Ibid*.

²⁰⁵ Article 11(2) of the Universal Declaration of Human Rights, 1948.

²⁰⁶ Article 15 of the International Covenant on Civil and Political Rights, 1966.

²⁰⁷ Bassiouni 2011: 300.

²⁰⁸ Grabert 2015: 11.

²⁰⁹ Cassese 2003: 154–156.

maintaining that the principle of legality necessitates precise and clear definitions of offences for individuals to understand prohibited conduct.²¹⁰ Consequently, in terms of article 22(2) of the Rome Statute, if the act of forced marriage is not codified under the Rome Statute, the principle of legality demands that individuals involved in such conduct should not be charged, let alone be prosecuted and convicted.²¹¹ Doing so would undermine the principle of legality and, more generally, the right of the accused to a fair trial.

Yet, with the pervasiveness of forced marriage in armed conflicts in countries, such as Sierra Leone,²¹² Cambodia,²¹³ and Uganda,²¹⁴ the failure to hold those responsible for acts constituting forced marriage would be absurd and amount to a violation of women's right to access justice. Over the years, international courts and tribunals have problematically circumvented the principle of legality by prosecuting forced marriage under the general category of "other inhumane acts" as a crime against humanity or as "sexual slavery".²¹⁵ The crime of "other inhumane acts" is a general residual provision and has been referred to as a "catch-all" provision.²¹⁶ With article 22 of the Rome Statute making it clear that "the definition of a crime shall be strictly construed and shall not be extended by analogy", the tendency to interpret the existing crimes of "sexual slavery" and "other inhumane acts" to accommodate forced marriage amounts to extending these crimes by analogy since the elements of these crimes do not adequately speak to the crime of forced marriage.

Neither the statutes of the Special Court for Sierra Leone or the Extraordinary Chambers in the Courts of Cambodia, nor the Rome Statute make provision for the crime of forced marriage.²¹⁷ The continued prosecution of forced marriage by the SCSL, ECCC and the ICC

²¹⁰ Draft Code of Crimes against the Peace and Security of Mankind, 1996 available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf (accessed 3 Jul 2024).

²¹¹ *Ibid.*

²¹² Human Rights Watch 2003.

²¹³ *Prosecutor v Chea & Samphan* Case no 002/19-09-2007/ECCC/TC (18 Dec 2009) per second request for investigative actions concerning forced marriages and forced sexual relations.

²¹⁴ Carlson and Mazurana (2008) "Forced Marriage within the Lord's Resistance Army, Uganda" available at <https://fic.tufts.edu/assets/Forced+Marriage+within+the+LRA-2008.pdf> (accessed 29 April 2022).

²¹⁵ *Prosecutor vs Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu (the AFRC Accused)* SCSL-04-16-T (20 Jun 2007); *Prosecutor v Charles Ghankay Taylor* SCSL-03-1-T (26 Apr 2012) ; *Prosecutor v Germain Katanga & Mathieu Chui* Case no ICC-01/04-01/07 OA 8 (25 Sep 2009). Some of these cases are separate documents. Separate case notes. See, also, arts 7(1)(g)-2 and 7(1)(k) of the Rome Statute: Elements of Crime of the International Criminal court, 2010. At this point, it is vital to highlight the criminal elements of sexual slavery and inhumane acts, thereby enriching the depth of the discussion. The ICC Elements of Crimes meticulously delineates the elements of sexual slavery and inhumane acts as follows: "The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty." Furthermore, it has defined inhumane acts in the following manner, namely where the "perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act."

²¹⁶ Frulli 2008: 1035.

²¹⁷ Article 2 of the Statute of the Special Court for Sierra Leone, 2002; art 7 of the Rome Statute: Elements of

therefore reflects total disregard for the principle of legality, a practice that can be traced back to the era of the Nuremberg and Tokyo tribunals as outlined in previous paragraphs.

The Special Court for Sierra Leone (hereafter “SCSL”) was the first hybrid international criminal tribunal to prosecute and define the crime of forced marriage in international criminal jurisprudence.²¹⁸ Forced marriage was prosecuted before and defined by the court without a criminal statute penalising it as such.²¹⁹ It was categorised as an inhumane act²²⁰ in the case of *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu* (hereafter “the *Brima* case”)²²¹ and defined as “a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental, or psychological injury to the victim”.²²² On appeal, the court proceeded to delineate both the physical (*actus reus*) and mental (*mens rea*) elements of forced marriage. The court highlighted that the crime of forced marriage—²²³

[i]nvolves 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.

The decision indicates that the crime of forced marriage has three *actus reus* elements, namely, first, force, threat of force or coercion; secondly, a conjugal association; and thirdly, severe suffering, or mental or psychological injury to the victim.²²⁴

The crime of forced marriage was also tried in *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (hereafter the “*RUF* case”)²²⁵ and *Prosecutor v Charles Ghankay Taylor* (hereafter the “*Taylor* case”).²²⁶ However, in both these judgments, forced marriage was

Crimes of the International Criminal Court, 2010; art 5 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 2004; and art 7 of the Rome Statute of the International Criminal Court, 1998.

²¹⁸ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu (the AFRC Accused)* SCSL-04-16-T (20 Jun 2007).

²¹⁹ *Ibid.*

²²⁰ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu (the AFRC Accused)* SCSL-04-16-T (22 Feb 2008) paras 199–203. See, also, art 2(i) of the Statute of the Special Court for Sierra Leone, 2002.

²²¹ SCSL-04-16-T (22 Feb 2008).

²²² *Idem* para 196.

²²³ *Idem* para 195. The AFRC Appeals Court defined this as “a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim” and added that “forced marriage implies a relationship of exclusivity between the ‘husband’ and ‘wife’, which could lead to disciplinary consequences for breach of this exclusive arrangement”.

²²⁴ Jalloh 2014: 211.

²²⁵ SCSL-04-15-T (2 Mar 2009).

²²⁶ SCSL-03-1-T (26 Apr 2012).

prosecuted as a crime under another existing crime, namely as sexual slavery in the *Taylor* case²²⁷ and as an inhumane act in the *RUF* case.²²⁸ Moreover, similar to other courts and tribunal, the SCSL seemed not to adhere strictly to the criminal elements of the crimes of sexual slavery and inhumane acts. This is evident in the *Brima* case, where the court asserted that forced marriage entails enslavement, a facet of sexual slavery.²²⁹ The court reasoned that enslavement within the context of forced marriage took place when girls were abducted and held in conditions akin to slavery. It further emphasised that proof of selling or bartering was not a requisite to establishing enslavement in forced marriages.²³⁰ Such an interpretation, however, goes squarely against the accepted elements of the crime of sexual slavery, of which the major component is selling, lending or bartering. If anything, the *Brima* case in essence extended the crime of sexual slavery by analogy and neglected to interpret that crimes strictly, as is required by the principle of legality.

The approach of the court in the *Brima* case was also followed in the *Taylor* case. In the latter case, the court expanded on the view held in the *Brima* case by considering forced marriage as a “conjugal form of enslavement”.²³¹ The court insisted that “there is no requirement that there be any payment or exchange in order to establish the exercise of ownership”.²³² One view contends that prosecuting forced marriage as conjugal slavery is merely linguistic camouflage, effectively equating it with sexual slavery or enslavement.²³³ In an attempt to clarify that conjugal slavery is not a new crime, the court therefore undermined the principle of legality when it expanded the elements of sexual slavery and enslavement by camouflaging forced marriage as sexual slavery. Forced marriage, a distinct crime in itself, was thus subsumed within the crime of sexual slavery through the court’s failure to interpret the crime strictly.

In a similar vein, the SCSL did not strictly adhere to the criminal elements of the crime of inhumane acts when considering the crime of forced marriage. On appeal, the court in the *Brima* case²³⁴ employed IHRL instruments, including the Convention on the Elimination of All Forms of Discrimination against Women(hereafter “CEDAW”), to classify forced marriage as

²²⁷ *Idem* para 428.

²²⁸ SCSL-04-15-T (2 Mar 2009) para 678, 682 and 685; *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* SCSL-04-15-A (26 Oct 2009) para 740, 861 and 972.

²²⁹ SCSL-04-16-T (20 Jun 2007) paras 704–706.

²³⁰ *Idem* para 709.

²³¹ *Prosecutor v Charles Ghankay Taylor* SCSL-03-1-T (26 Apr 2012) para 427.

²³² *Idem* para 420; *Prosecutor vs Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu (the AFRC Accused)* SCSL-04-16-T (20 Jun 2007) para 709.

²³³ Sellers 2011: 130, 137, 142.

²³⁴ SCSL-04-16-T (20 Jun 2007) para 12 per the separate concurring opinion of Sebutinde J pursuant to rule 88(C).

a human rights violation.²³⁵ The court adopted the argument advanced by Justice Sebutinde in her dissenting opinion, asserting forced marriage as a crime against humanity.²³⁶ Justice Sebutinde emphasised that a forced-marriage relationship resembles that of a slave-owner one due to the use of the term “wife” to illustrate domination and control, actions prohibited by CEDAW.²³⁷ Although Sebutinde identified forced marriage as a prohibited act under CEDAW, she clarified that human rights law does not penalise forced marriage as a crime.²³⁸ This reliance on human rights instruments to interpret existing provisions raises concerns regarding the distinction between IHRL and ICL. Whereas the former does not attach individual criminal responsibility to prohibited conduct, the latter defines crimes and creates punishment for such crimes.²³⁹

Comparably, in *Prosecutor v Chea & Samphan*, the ECCC found the accused guilty of the crime of forced marriage under the category, “other inhumane acts”,²⁴⁰ even though the ECCC statute did not explicitly list forced marriage as a crime.²⁴¹ The ECCC, influenced by the SCSL, deemed victims of forced marriage to have endured “serious physical or mental suffering or injury”.²⁴² The ECCC drew on various human rights instruments – including the Universal Declaration of Human Rights, 1948; the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956; the International Covenant on Economic, Social and Cultural Rights, 1966; the American Convention on Human Rights, 1969; and the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (also known as the European Convention of Human Rights) – to conclude that the crime of forced marriage falls within the definition of “other inhumane acts”.²⁴³ The elements of forced marriage identified by the Appeals Chamber in the *Brima* case include forcing a person into a conjugal partnership, causing great suffering or serious mental or physical injury to the victim, as well as the exclusivity of the relationship.²⁴⁴ While the crime of forced marriage shares some elements with that of inhumane acts, such as causing serious physical or mental suffering or injury, it possesses specific criminal elements as defined by the

²³⁵ *Prosecutor v Dominic Ongwen* Case no ICC-02/04-01/15-1762 (4 Feb 2021): 2748.

²³⁶ *Ibid.*

²³⁷ Clark 2012: 23

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Prosecutor v Chea & Samphan* Case no 002/19-09-2007/ECCC/TC (16 Nov 2018):3694, 3691–3693.

²⁴¹ Article 5 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 2004.

²⁴² *Prosecutor v Chea & Samphan* Case no 002/19-09-2007/ECCC/TC (18 Nov 2009) para 11.

²⁴³ *Idem* paras 2412–2413 per Samphan’s closing brief (25 Mar 2019).

²⁴⁴ *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* SCSL-04-15-A (26 Oct 2009) para 195.

Brima case.²⁴⁵ In trying to establish forced marriage as an inhumane act, the courts and tribunals rely on the broad provisions regarding inhumane acts, contributing to the extension of specific crimes by analogy.²⁴⁶ However, it is vital to remember that the principle of legality prohibits extending existing crimes through analogy. This principle emphasises the need for precision in defining criminal acts.²⁴⁷

The ICC also accepted the crime of forced marriage as a form of sexual slavery in *Prosecutor v Katanga & Chui*²⁴⁸ and as a form of “other inhumane acts” in *Prosecutor v Dominic Ongwen* (hereafter “the *Ongwen* case”).²⁴⁹ As its predecessors, the ICC failed to explicitly list forced marriage as a crime in the Rome Statute.²⁵⁰ In *Prosecutor v Germain Katanga & Mathieu Chui*,²⁵¹ the first ICC judgment addressing forced marriage, the court referenced evidence of sexual acts to subsume forced marriage as a form of sexual slavery, emphasising the perpetrator’s role in causing individuals to engage in sexual acts.²⁵² Moreover, the court submitted that the facts of the case encompass situations where “women and girls were forced into marriage ... involving compulsory sexual activity, including rape, by their captors”.²⁵³ Confirming forced marriage as a form sexual slavery, the court appears to have expanded the crime of sexual slavery to accommodate that of forced marriage, neglecting the diverse dimensions of the latter as mentioned in the *Brima* case.²⁵⁴ This mirrors the approach of the SCSL in the *Brima*²⁵⁵ and *Taylor*²⁵⁶ cases.

Similarly to *Prosecutor v Chea & Samphan*,²⁵⁷ the *Ongwen* case²⁵⁸ relied on several IHRL instruments²⁵⁹ to conclude that the victims’ experiences, causing “great suffering, or

²⁴⁵ Article 7(1)(k) of the Rome Statute: Elements of Crimes of the International Criminal Court, 2010.

²⁴⁶ *Prosecutor v Chea & Samphan* Case no 002/19-09-2007/ECCC/TC (16 Nov 2018): paras 3694, 3691–3693; *Prosecutor v Dominic Ongwen* Case no ICC-02/04-01/15 A (15 Dec 2022) para 1015.

²⁴⁷ Grabert 2015: 11.

²⁴⁸ Case no ICC-01/04-01/07 (30 Sep 2008) paras 431, 434–435.

²⁴⁹ Case no ICC-02/04-01/15 A (15 Dec 2022): 1015.

²⁵⁰ Article 7 of the Rome Statute: Elements of Crimes of the International Criminal Court, 2010; art 7 of the Rome Statute of the International Court, 1998.

²⁵¹ Case no ICC-01/04-01/07 OA 8 (25 Sep 2009).

²⁵² *Ibid.*

²⁵³ *Ibid.* See, also, *Prosecutor v Katanga & Chui* Case no ICC-01/04-01/07 (30 Sep 2008): 431.

²⁵⁴ See nn 223 – 224 *supra*.

²⁵⁵ See n 230 *supra*.

²⁵⁶ See nn 232 –233 *supra*.

²⁵⁷ *Prosecutor v Chea & Samphan* Case no 002/19-09-2007/ECCC/TC (25 Mar 2019) paras 2412–2413 per Samphan’s closing brief.

²⁵⁸ *Prosecutor v Dominic Ongwen* Case no ICC-02/04-01/15-1762-Red (4 Feb 2021).

²⁵⁹ *Idem* para 2748. The court relied on General Comment 28 of the CEDAW Committee, 2000; the Universal Declaration of Human Rights, 1948; the Convention on the Elimination of All Forms of Discrimination Against Women, 1980; the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 1986, also known as the Maputo Protocol; the European Convention on Human Rights, 1950; the Universal Islamic Declaration of Human Rights, 1981; the (revised) Arab Charter on Human Rights, 2008; and the Report of the United Nations High Commissioner of Human Rights, 2019 available at

serious injury to body or to mental or physical health” constituted “other inhumane acts” as a crime against humanity.²⁶⁰ Notably, human rights law does not establish individual criminal responsibility for forced marriage,²⁶¹ and relying on IHRL instruments to stretch the interpretation of “other inhumane acts” to include an undefined crime is not in line with the principle of legality.

From these judicial decisions, it appears that, rather than relying on ICL statutes or evaluating the crime of forced marriage against the *actus reus* and *mens rea* elements of “other inhumane acts”, the courts turn to IHRL instruments to interpret “other inhumane acts” in justifying forced marriage as a crime against humanity. This approach mirrors the prosecution of the crime of forced marriage as a form of sexual slavery, raising questions about whether these courts have created a distinct crime and are coercing it to fit the definition of sexual slavery. Such practice raises doubts about the adherence to the principle of legality, which demands clarity, precision, certainty, and specificity²⁶² in defining crimes. Furthermore, the lack of precision in the crime of “other inhumane acts” under various ICL statutes has led the courts to further contravene the principle of legality by extending the scope of existing criminal provisions by analogy.

6 Conclusion

The principle of legality, a cornerstone of ICL, demands clear definitions of crimes and prohibits extension of crimes by analogy. This contribution examines the tension between the principle of legality and the prosecution of the crime of forced marriage in ICL. The study begins by exploring the historical context of the circumvention of the principle of legality by analysing the challenges associated with the principle in the Nuremberg and Tokyo tribunals after World War II. Those trials marked a significant turning point in ICL by establishing the notion of individual criminal responsibility for war crimes, crimes against humanity and for the act of aggressive war. However, the trials exposed the challenges associated with the principle of legality, particularly regarding the retroactive application of new or undefined crimes. The study highlights the fact that these military tribunals were hesitant to acknowledge and adhere to the principle of legality,²⁶³ with some judges even suggesting it was merely a

<https://undocs.org/en/A/HRC/41/19> (accessed 14 Jul 2024).

²⁶⁰ *Ibid.*

²⁶¹ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu (the AFRC Accused)* SCSL-04-16-T (20 Jun 2007) para 12 per the separate concurring opinion of Sebutinde J pursuant to r 88(C).

²⁶² See, nn 9 - 13.

²⁶³ IMTFE Tokyo Records vol 109: 5, 44–45 per separate opinion of Röling J (4 Nov 1948).

rule of policy, and not justice.²⁶⁴ Moreover, in examining the relevant decisions of the Nuremberg and Tokyo trials, it becomes evident that although the principle of legality was acknowledged, its strict application was deemed less important when prosecuting such egregious acts. This same issue persists in contemporary courts and tribunals, as evidenced by the prosecution of the crime of forced marriage under existing crimes, such as that of “other inhumane acts” or “sexual slavery”.

The contribution highlights three important points. First, the Nuremberg and Tokyo Charters exhibited fundamental ambiguity towards the principle of legality. The Charters listed and defined crimes, but also allowed the accused to argue that the charges were *ex post facto*. Secondly, the London Conference revealed differing perspectives among the Allied nations on how to address retroactive crimes and their definitions within the Charters. Thirdly, these military tribunals, while established to hold accountable perpetrators of World War II atrocities, faced criticism for potentially violating the *nullum crimen sine lege* principle through the retroactive application of newly created crimes. Despite these challenges, the Nuremberg and Tokyo trials set the precedent for holding war criminals accountable for their actions. The trials, though criticised for potentially violating the principle of legality, had a lasting impact by inspiring the development of a more comprehensive international criminal justice system, which would ensure compliance with the *nullum crimen sine lege* principle.

The discussion then looks at contemporary courts and tribunals, focusing on the prosecution of the crime of forced marriage. Despite the absence of explicit provisions for that crime in ICL statutes, the courts have extended existing crimes by analogy, raising concerns regarding the adherence to the principle of legality. The latter principle, contained in article 22(2) of the Rome Statute, demands clear definitions and prohibits exactly that. However, all three the contemporary courts mentioned here have prosecuted the crime of forced marriage under “sexual slavery” or the broader category of “other inhumane acts”. This approach raises certain concerns. First, the courts are extending crimes by analogy through interpreting existing crimes broadly to encompass the crime of forced marriage, disregarding the principle of legality. Secondly, the courts use human rights instruments that do not establish individual criminal responsibility to justify prosecution under ICL. This undermines the distinction between ICL and human rights law. Lastly, stretching the definition of existing crimes, such as “other inhumane acts” and “sexual slavery” creates ambiguity regarding the specific elements constituting forced marriage as a crime. It is submitted that a new approach be utilised to ensure

²⁶⁴ See, nn 40, 7. See, also, nn 196, 26.

fairness and to uphold the rule of law, and that ICL statutes rather be amended to explicitly criminalise the crime of forced marriage.

In conclusion, the principle of legality remains a fundamental principle of ICL, yet its application faces challenges as evidenced by both the historical context of the Nuremberg and Tokyo tribunals and the contemporary issue of the prosecution of the crime of forced marriage. The tribunals' struggle to balance accountability for new atrocities with adherence to established legal principles imitates the current practice of prosecuting forced marriage under broader categories of existing crimes. This lack of a statutory definition for the crime of forced marriage creates ambiguity regarding the elements of the crime and raises concerns about the fairness and predictability in ICL. From the historical examples mentioned here, it is clear that a lack of a clear definition may lead to inconsistencies in prosecution. In addition, it undermines the principle of legality. To ensure clarity and to uphold the principle of legality, ICL statutes should be amended to explicitly criminalise the act of forced marriage. This will promote a balanced approach within ICL.

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