FORCED MARRIAGE AND ITS LEGAL CHARACTERIZATION AS A CRIME AGAINST HUMANITY: SEXUAL SLAVERY, OTHER INHUMANE ACTS, OR BOTH?*

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1. Introduction

Forced marriage has been a particularly recurrent practice in the armed conflicts in Uganda, Sierra Leone, the Democratic Republic of the Congo (DRC) and Cambodia. The Lord's Resistance Army's (LRA) systematic and widespread practice is an example of this, whereby its members have, for decades, taken women as 'wives', subjecting them to slavery, rape, forced labor, forced pregnancy and cruel treatment.

Although there are several definitions of this phenomenon, the core of the problem is the lack of free and full consent by the victim.[1] In this sense, Gill and Anitha's definition insightfully reflects on this situation by considering as forced marriage any '[…] marriage in which one or both spouses do not (...) consent to the marriage and duress is involved. Duress can include physical, psychological, financial, sexual and emotional pressure'.[2]

Since the practice of forced marriage is not explicitly provided for in any of the existing categories of crimes against humanity (CAH), there are different positions as to its legal characterization. This debate goes back to the cases concerning the Armed Forces Revolutionary Council (AFRC) and Liberia's former President, Charles Taylor, before the Special Court for Sierra Leone (SCLT). It continued in case 002 before the Extraordinary Chambers of the Courts of Cambodia (ECCC) and in the Ongwen case before the International Criminal Court (ICC).

It took until the Ongwen trial judgment for the ICC to address the practice of forced marriage in a comprehensive and in-depth manner. This tardiness is not coincidental, but rather a result of the lack of development of case law on gender and sexual crimes. In its judgment, Trial Chamber (TC) IX legally characterized forced marriage as a CAH of 'other inhumane acts' (defined in article 7(1)(k) of the ICC Statute (ICCS)), thus establishing a precedent on the seriousness of the physical and psychological consequences that such practice entails for the victims.

Nevertheless, the Defense argued in the appeals process that TC IX erred because the crime of forced marriage is not expressly provided for in the ICCS and, therefore, the ICC cannot create a new crime by considering this practice as a CAH of other inhuman acts.[3] By contrast, the Office of Public Counsel for Victims of the ICC (OPCV) supported TC IX´s conviction for the CAH of "other inhumane acts" because the practice of forced marriage meets all requirements provided for in Article 7(1)(k) of the ICCS.[4] Finally, a third approach considers that forced marriage may constitute two CAH with distinct elements (sexual slavery and other inhuman acts), thus justifying cumulative convictions for both of them.

Considering the above, this paper seeks to analyze whether forced marriage should be legally characterized as a CAH of "sexual slavery" or as a CAH of "other inhumane acts". Furthermore, it studies the possibility, under specific circumstances, of convicting an accused person with cumulative convictions for both CAH. This possibility is explored because forced marriage is not entirely encompassed by the legal definition of sexual slavery, since not all types of harm experienced by victims of forced marriage are sexual in nature.

In order to analyze and study this issue, a jurisprudential and doctrinal study will be conducted, particularly focusing on case law of international and hybrid criminal courts.

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[1] Borowska, M. (2013), 'The Phenomenon of Forced Marriage', *Review of Comparative Law,* Vol. 18, p. 24.

[2] Gill, A., Sundari, A. (2011), *Forced Marriage: Introducing a Social Justice and Human Rights Perspective*, London, Zed Books, p. 26.

[3] ICC, the Prosecutor v. Dominic Ongwen, Appeals Chamber, *Defense Appeal Brief Against the Convictions in the Judgment of 4 February 2021*, October 19, 2021, Doc. No.: ICC-02/04-01/15, para. 148.

[4] ICC, the Prosecutor v. Dominic Ongwen, Appeals Chamber, *Public redacted version of CLRV Observations on the Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021*, October 28, 2021, Doc. No.: ICC-02/04-01/15, para. 175.

2. Forced marriage as constituting a crime against humanity of sexual slavery

2.1 The jurisprudence of the Special Court for Sierra Leone

In the 1990s, Sierra Leone's armed conflict was characterized by extreme brutality[5] and by the systematic and widespread practice of forced marriage. Hundreds of women and girls were abducted and forced to become 'wives' of their captors. Sierra Leonian armed groups (the Armed Forces Revolutionary Council (AFRC), the Revolutionary United Front (RUF) and the Civil Defense Forces (CDF)) and governmental forces carried out this practice. The report of the Sierra Leonian Truth and Reconciliation Commission noted that 'women and girls were detained under conditions of extreme cruelty with the deliberate intention of raping and perpetrating other acts of sexual violence upon them.'[6]

Since forced marriage is not explicitly criminalized in the SCSL Statute (SCSLS), there are two positions regarding the legal characterization of this conduct as a CAH. The first position, held by the judgments of TC II in the cases of the AFRC and Charles Taylor, considers forced marriage as a CAH of sexual slavery, according to Article 2(g) of the SCSLS. The second position, held by the Appeals Chamber (AC) judgment in the AFRC case, considers forced marriage as a CAH of other inhumane acts, pursuant to Article 2(1) of the SCSLS.

Regarding the first position, TC II's judgment in the AFRC found that forced marriage was subsumable into the CAH of sexual slavery, since the defendants used the term 'wife' intending to exercise the right of ownership over the victim, rather than assuming a marital relationship or a quasi-marital status.[7] Judge Julia Sebutinde issued a Separate Concurring Opinion regarding the practice of forced marriage in Sierra Leone. She concluded that the sexual element inherent in this practice tends to dominate and obscure the other elements therein, such as forced labor and other forced conjugal duties of 'bush wifes'. Thus, for Sebutinde, all elements provided for in Article 2 (g) of the SCSLS for the CAH of sexual slavery were met.[8]

TC II's judgment in the Charles Taylor case also considered the practice of forced marriage as a CAH of sexual slavery. TC II quoted the judgment in the AFRC case mentioned above and concluded that this practice, which occurred during the civil war in Sierra Leone, constituted a specific form of sexual slavery, better defined as 'conjugal slavery'. This is because women and girls were enslaved with the dual purpose of continuous rape and forced domestic labor.[9] TC II specified that 'marital slavery' was not a new crime, but rather a practice with certain distinctive features, such as forced conjugal labor, the assertion on the victim's

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[5] SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzt Kamara & Santigie Borbor Kanu, Appeals Chamber, *Judgment*, February 22, 2008. Case No.: SCSL-04-16-T.

[6] Sierra Leone, Truth & Reconciliation Commission Report, (2004), 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission', *Graphic Packaging Ltd. GCGL,* Vol. 2, Chapter 2, p. 101. The West Side Boys case was a particularly grave situation, where a group of renegade soldiers linked to the AFRC and RUF, who 'kidnapped women and children, retained them against their will and perpetrated a series of brutal and inhumane acts upon them'. These acts have been thoroughly documented and condemned in multiple instances by different entities and international organizations; Human Rights Watch, (2003), 'We'll kill you if you cry' sexual violence in the Sierra Leone conflict', *Human Rights Watch,* Vol. 15, No. 1 (A), p. 17.

[7] SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzt Kamara & Santigie Borbor Kanu, Trial Chamber II, *Judgment,* June 20, 2007, Case No.: SCSL-04-16-T, paras. 703, 711; 713.

[8] SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzt Kamara & Santigie Borbor Kanu, Trial Chamber II, *Separate Opinion of Judge Sebutinde,* June 20, 2007 Case No.: SCSL-04-16, para. 576. According to the judge: 'The general and specific elements of the crime against humanity of Sexual Slavery are satisfied in that forced 'marriage' invariably occurred as part of a widespread or systematic attack on the civilian population in Sierra Leone. In addition, The 'bush husband' exercised any or all the powers attaching to the right of ownership over his 'bush wife' whereby not only was she was held under captivity and not at liberty to leave but, in addition, she was forced to render gender-specific forms of labour (conjugal duties) including cooking, cleaning, washing clothes and carrying loads for him, for no genuine reward. Invariably, the 'bush husband' regularly subjected his 'bush wife' to sexual intercourse, often without her genuine consent and to the exclusion of all other persons; The 'bush husband' abducted and forcibly kept his 'bush wife' in captivity and sexual servitude with the intention of holding her indefinitely in that state'.

[9] SCSL, the Prosecutor v. Charles Ghankay Taylor, Trial Chamber II, *Judgment,* May 18, 2012, Case No.: SCSL-03-01-T, paras. 425-426, 2035.

status as 'wife', the exercise of exclusive sexual control (prohibiting others from sexually accessing her), and coercing the victim into performing domestic chores such as cooking and cleaning, that fall within the scope of sexual slavery.[10]

2.2 The Jurisprudence of the International Criminal Court

One of the first ICC decisions in which forced marriage is mentioned is the Katanga *Decision on the Confirmation of Charges* of 2008. In its decision, PTC I did not confirm any charges related to sexual slavery and forced marriage, since the Prosecution did not include them in the charging document. The only charges confirmed by PTC I were the CAH of murder and the war crimes of attacking civilians, destruction of property, and pillaging. Nevertheless, PTC I highlighted that '[...] sexual slavery also encompasses situations where women and girls are forced into 'marriage', domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be practices such as the detention of women in rape camps or comfort stations, forced temporary marriages to soldiers, and other practices that include the treatment of women as chattels, and as such, violations of the peremptory norm prohibiting slavery'.[11]

Additionally, PTC I found that there was sufficient evidence to believe that 'when the combatants (i) abducted women from the village of Bogoro (DRC), (ii) captured and imprisoned them and kept them as their "wives", and (iii) forced and threatened them to engage in sexual intercourse, they intended to sexually enslave the women or knew that by committing such acts, sexual enslavement would occur'.[12]

Another ICC decision in which forced marriage is mentioned, is the 2012 trial judgment in the Lubanga case, in which TC I analyzed evidence related to the charge of conscripting and enlisting children under the age of 15 in hostilities as war crime under article 8(2)(e)(vii) of the ICCS. TC I concluded that the accused was guilty of these crimes. During its analysis, TC I stated that it would be impermissible to cast any opinion on how the issue of sexual violence was to be treated in this context, since Pre-Trial Chamber I did not confirm any charges related to sexual slavery and forced marriage. PTC I never confirmed these charges, because the Prosecution failed to charge 'rape and sexual enslavement at the relevant procedural stages', and 'factual allegations potentially supporting sexual slavery [were] simply not referred to at any stage in the Decision on the Confirmation of Charges'.[13]

2.3 Doctrine

Iris Haenen argues that the practice of forced marriage in the Sierra Leone and Ugandan's armed conflicts, ought to be considered sexual slavery, because the perpetrator's real purposes are of a sexual nature.[14] Similarly, Mazurana highlights the many similarities that exist between forced marriages that occurred in the Ugandan, the DRC, and the Sierra Leonian armed conflicts.[15] He recalls the statement of the former ICC Prosecutor, Luis Moreno-Ocampo, on the 2005 Uganda Arrest Warrants . According to Moreno Ocampo, "[t]he LRA

[10] SCSL, the Prosecutor v. Charles Chankay Taylor, Trial Chamber II, *Judgment,* May 18, 2012, Case No.: SCSL-03-01-T, paras. 428–430.

[11] ICC, the Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Pre-trial Chamber I, *Decision on the confirmation of charges*, September 30, 2008, Doc. No.: ICC-01/04-01/07, para. 43l.

[12] *Ibid*., para. 435.

[13] ICC, the Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, *Judgment*, March 14, 2012, Doc. No.: ICC-01/04-01/06, para. 629-630.

[14] Haenen, I. E. M. M.. (2013), 'The parameters of enslavement and the act of forced marriage', *International Criminal Law Review,* Vol. 13, No. 4, p. 914, 915.

[15] Carlson, K. & Mazurana, D. (2008), *Forced marriage within the Lord's Resistance Army, Uganda,* Feinstein International Center, Tufts University, p. 22.

corrupts language to cover their criminal acts [the abduction, distribution and use of girls] by calling the girls "wives" or "sisters", although they have been enslaved."[16]

Regarding the *mens rea* element of forced marriage, Gong-Gershowitz contends that the perpetrator's use of the term "wife" can be considered as proof of intent to engage in acts of sexual slavery, because assertions of exclusivity may be considered as evidence of ownership and/or control over the victim. Thus, forced marriage "in the context of armed conflict represents the perpetrator's exercise of ownership over his "wife," and when the exercise of ownership involves sexual acts, it constitutes sexual slavery". [17] In sum, the author argues that it would not be appropriate to consider forced marriage as a CAH of other inhumane acts, because such legal characterization could potentially minimize the harm suffered by the victims. This is particularly insidious because the exercise of ownership rights over the victim, as well as the acts of sexual violence, would be hidden under the appearance of a marriage (a legitimate social institution).

3. Forced marriage as constituting a crime against humanity of other inhumane acts

3.1. Introduction to the crime against humanity of other inhumane acts

ICTY,[18] ICTR,[19] SCSL,[20] ECCC[21] and ICC[22] case law coincides on the fact that the CAH of 'other inhumane acts' encompasses actions or omissions which: (a) cause suffering or mental or serious physical harm or constitute a serious attack against human dignity; and (b) are of a similar character to other prohibited acts that constitute CAH. The main purpose of this residual clause is to chastise victimizing conduct that would otherwise remain unpunished. It is necessary because the atrocities committed by future perpetrators exceed the imagination of any given person.[23]

Chakrabarty considers that the 'other inhuman acts' clause enables the ICCS to adapt itself to new (or forgotten) forms of cruelty, as the article prevents any undue restraint on the exercise of jurisdiction by the ICC and provides sufficient notice to the international community of the criminal nature of such conduct. She underscores that the CAH of "other inhumane acts" protects the peremptory rights to life, health, liberty and human dignity provided for in customary international law. Moreover, she emphasizes that the ICCS itself empowers the ICC to base its decisions on International Human Rights Law (IHRL).[24]

In interpreting this residual clause, the maxim *nullum crimen sine iure, nulla poena sine iure* is fundamental, and international tribunals cannot violate it. Hence, when they examine if certain conduct can be legally characterized as 'other inhuman acts', they ought to consider the following criteria in order to determine if the seriousness' threshold is met: its nature, the

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[16] ICC, Office of the Prosecutor (2005), *Statement of the ICC Prosecutor, Luis Moreno Campo, on the Uganda Arrest Warrants*, October 14, 2005, p. 6.

[17] Gong-Gershowitz, J. (2009), 'Forced Marriage: A new crime against humanity?', *Northwestern Journal of International Human Rights*, Vol. 8, No.1, p. 72, para. 55.

[18] ICTY, the Prosecutor v. Tihomir Blaskic, Trial Chamber, *Judgment,* March 3, 2000, Case No.: IT-95-14-T, para. 241.

[19] ICTR, the Prosecutor v. Clément Kayishema & Obed Ruzindana, Trial Chamber II, *Judgment*, May 21, 1999, Case No.: ICTR-95-1-T, paras. 150-151.

[20] SCSL, the Prosecutor v. Charles Chankay Taylor, Trial Chamber II, *Judgment,* May 18, 2012, Case No.: SCSL-03-01-T, para. 436.

[21] ECCC, the Prosecutor v. Lim Suy-Hong, Matteo Crippa, Se Kolvuthy, Natacha Wexels-Riser, & Duch Phary, Trial Chamber, *Judgment*, July 26, 2010, Case No.: 001/18-07-2007/ECCC/TC, paras. 367- 369.

[22] ICC, the Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Pre-trial Chamber I, *Decision on the confirmation of charges*, September 30, 2008, Doc. No.: ICC-01/04-01/07, paras. 446-447.

[23] Cryer, R., Friman, H., Robinson, D. & Wilmshurst, E., (2010), *An Introduction to Criminal Law and Procedure,* New York, Cambridge University Press & ICRC, p. 265.

[24] Chakrabarty, I. (2018), 'Finding a way through: The possible inclusion of labour trafficking as an 'other inhumane act' under the rome statute', *Penn Undergraduate Law Journal*, Vol. 6, pp. 15-20.

context in which it occurred, the personal circumstances of the victim (age, sex and health) as well as the physical, mental and moral effects of the act upon the victim.[25]

Ambos and Triffterer stress that the CAH of 'other inhuman acts' provided for in article 7 (1)(k) of the ICCS, propounds a more restrictive approach, when it comes to including conduct not explicitly referred to in the ICCS. According to them, this provision has a different and narrower scope than the 'other inhuman acts' provision provided for in the ICTYS and the ICTRS. This is because article 7 (1)(k) of the ICCS requires the conduct in question to be 'of a similar character' to some of the prohibited acts under article 7 (1) of the ICCS (which, according to the authors, goes beyond requiring a similar 'seriousness').[26] In turn, for Chakrabarty, the gravity assessment must be carried out on the basis of the scale, nature, manner of commission and impact of the acts committed. Moreover, it must consider the context of the acts, prioritizing a qualitative analysis (acts that give rise to social alarm in a community) over a quantitative one.[27]

The case law of the international tribunals has established that the following conduct may constitute a CAH of 'other inhumane acts': destruction of religious and cultural property, detention under inhumane conditions, provision of starvation rations, unhygienic living conditions,[28] isolation from the outside, beatings, mistreatment,[29] serious injuries intended to cause the death of the victims[30] and forcing victims to witness acts committed against others, particularly against family or friends.[31]

3.2 The legal characterization of forced marriage as a crime against humanity of other inhumane acts

3.2.1. The jurisprudence of the Special Court for Sierra Leone

In February 2008, the Appeals Chamber of the SCSL reversed TC II's judgment in the AFRC case. The AC decided that forced marriage was a CAH of other inhumane acts, rather than a CAH of sexual slavery.[32] For the AC, forced marriage did not meet the elements of the CAH of sexual slavery because of two reasons: (i) it involves a perpetrator compelling a person by force or threat, into a coerced conjugal association with another person, resulting in great suffering on the part of the victim; and (ii) it implies a relationship of exclusivity between the "husband" and the "wife" – and the breach of this arrangement could ultimately have disciplinary consequences. According to the AC, these two reasons demonstrate that forced marriage is not predominantly a sexual crime, but rather a CAH of 'other inhumane acts'.

3.2.2 The jurisprudence of the Extraordinary Chambers of the Courts of Cambodia

On September 15, 2010, the TC of the ECCC initiated Case 002/02 against the four surviving members of the Khmer Rouge Central Committee - Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith. Following the appeal judgment in the AFRC case, the TC of the

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[25] ICTY, the Prosecutor v. Mitar Vasiljevic, Appeals Chamber, *Judgment*, February 25, 2004, Case No.: IT-98-32-A, para. 165.

[26] Ambos, K. & Triffterer, O. (2016), *The Rome Statute of the International Criminal Court: a commentary,* Oxford University Press, pp. 235-242.

[27] Chakrabarty, I. (2018), 'Finding a way through: The possible inclusion of labour trafficking as an 'other inhumane act' under the rome statute', *Penn Undergraduate Law Journal*, Vol. 6, p. 21.

[28] ICTY, the Prosecutor v. Mico Stanisic & Stojan Zupljanin, Trial Chamber I, *Judgment Volume 2 of 3*, March 27, 2013, Case No.: IT-08-91-T, paras. 776,778.

[29] ICTY, the Prosecutor v. Milorad Krnojelac, Trial Chamber II, *Judgment,* March 15, 2002, Case No: IT-97-25-T, paras 134.

[30] ICC, the Prosecutor v. Charles Blé Goudé, Pre-Trial Chamber I, *Decision on the confirmation of charges against Charles Blé Goudé*, December 11, 2014, Doc. No.: ICC-02/11-02/11, para 121.

[31] ICTR, the Prosecutor v. Clément Kayishema & Obed Ruzindana, Trial Chamber II, *Judgment*, May 21, 1999, Case No.: ICTR-95-1-T, para. 153.

[32] SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzt Kamara & Santigie Borbor Kanu, Appeals Chamber, *Judgment*, February 22, 2008, Case No.: SCSL-04-16-A, paras. 195-202.

ECCC also considered forced marriage as a CAH of 'other inhumane acts', rather than a CAH of sexual slavery.[33]

In Cambodia, most forced marriages took place after 1975, when the Communist Party of Kampuchea (CPK), known as the Khmer Rouge, won the civil war and seized power. The objective of the regime led by Pol Pot was to achieve a communist revolution and regulate the constitution of families.[34] According to Neha Jain, the Khmer Rouge despised human life and produced large-scale repression and massacres. They turned the country into a huge detention center, which later became a graveyard for almost three million people, including their own members and even some top leaders.[35]

During this regime, marriages between previously unknown people were performed in massive public ceremonies. These unions were characterized by being impersonal. Women agreed to these marriages out of violence or fear, or to avoid being sent to do forced labor. Additionally, the consummation of the marriage was mandatory, as refusing to do so would lead to beatings, imprisonment or even death. According to some witnesses, forced marriages in Cambodia were a matter of state policy.[36]

LeVine mentions that, at Khmer Rouge weddings, women and men were sometimes paired off at the request of labor camp chiefs, arbitrarily, or based on geographical proximity to where they grew up. They were additionally ordered to love each other, to have sexual relations in some cases, to live together in the same commune, or on the contrary, to separate.[37] Moreover, Theresa de Langis points out how, in some cases, forced marriage caused social exclusion and discrimination. This was especially true in the case of abandoned, divorced or widowed women, or of women involved in a polygamous marriage. This marginalization was often passed on to their children, who were not generally included in the wedding ceremonies of their communities. Sometimes, the victims would prefer to remain silent and not share their experiences, out of fear of stigmatization.[38]

3.2.3 The jurisprudence of the International Criminal Court

The Prosecution charged Dominic Ongwen as a direct and indirect perpetrator of forced marriage as a CAH of other inhumane acts. The Defense, however, contended that this practice should have been charged a CAH of sexual slavery.[39] In its Decision on the Confirmation of Charges, PTC II concluded that the central element of forced marriage is the imposition of the marriage on the victim, regardless of her will. This situation results in further social stigma for the victim. Hence, the Chamber concluded that forced marriage is not a predominantly sexual crime.[40]

PTC II relied on the appeal judgment in the AFRC case and the ECCC's case law. It concluded that forced marriage can constitute a CAH of other inhumane acts, since it takes place when '[t]he accused, by force, threat of force, or coercion, or by taking advantage of

[33] ECCC, the Prosecutor v. Nuon Chea, Khieu Samphan, Ieng Sary & Ieng Thirith, Trial Chamber, *Judgment,* August 7, 2014, Case No.: 002/02, paras 740-749.

[34] International Federation for Human Rights. (2018), 'Cambodia: In landmark verdict, the Khmer Rouge Tribunal recognizes forced marriage as a crime against humanity and convicts former Khmer Rouge leaders for genocide*'. International Federation For Human Rights,* p. 1 ; ECCC, the Prosecutor v. Nuon Chea, Khieu Samphan, Ieng Sary & Ieng Thirith, Trial Chamber, *Summary of judgment in case 002/02*, November, 16, 2018, Case File No. 002/19-09-2007/ECCC/TC, para. 39.

[35] Jain, N. (2008), 'Forced Marriage as a Crime against Humanity, Problems of Definition and Prosecution', *Journal of International Criminal Justice*, Vol. 6, pp. 1022–1023.

[36] *Ibid.,* p. 1026

[37] LeVine, P. (2010), *Love and Dread in Cambodia: Weddings, Births, and Ritual Harm Under the Khmer Rouge,* National University of Singapore Press, p. 31.

[38] de Langis, T., Strasser, J, Kim, T. & Taing, S. (2014), *Like Ghost Changes Body: A Study on the Impact of Forced Marriage under the Khmer Rouge Regime*, Transcultural Psychosocial Organisation, pp. 57, 61.

[39] ICC, the Prosecutor v. Dominic Ongwen, Pre Trial Chamber II, *Decision on the confirmation of charges*, March 23, 2016, Doc. No.: ICC-02/04-01/15, para. 87.

[40] *Ibid.*, para. 93.

coercive circumstances, causes one or more persons to serve as a conjugal partner, and the perpetrator's acts are knowingly part of a widespread or systematic attack against a civilian population and amount to the infliction of great suffering, or serious injury to body or to mental or physical health sufficiently similar in gravity to the enumerated crimes against humanity'.[41] For PTC II, forced marriage has a gravity comparable to other CAH under article 7, because victims are forced into a conjugal relationship under coercive circumstances.[42]

In 2021, TC IX's judgment affirmed that the CAH of 'other inhumane acts', as defined in Article 7(1)(k) of the ICCS, must be interpreted in a conservative manner in order to preserve the *nullum crimen, nulla poena, sine iure* maxim.[43] Consistent with the Decision on the Confirmation of Charges, TC IX explained the distinction between the CAH of sexual slavery and other inhumane acts: while the former sanctions the exercise of powers attached to the right of ownership over the sexual autonomy of the victim,[44] the latter entails the imposition of conjugal association upon the victim.[45] Furthermore, TC IX affirmed that forced marriage does not necessarily require the exercise of ownership over a person (an essential and inherent element of the CAH of sexual slavery).[46] TC IX further asserted that the harm suffered from this practice consists of the ostracism of the victims from their communities, mental trauma, serious attack on their dignity, and the deprivation of their fundamental rights to choose a spouse.[47]

3.3 Doctrine

Frulli argues that the practice of forced marriage is not adequately described by international crimes of a sexual nature (including the CAH of sexual slavery), since it entails specific elements of psychological and moral suffering for the victims.[48] For this reason, he claims that this egregious conduct is better prosecuted as a stand-alone crime, under a definition that describes the entirety and complexity of forced marriage.[49] Similarly, Scharf and Mattler consider that the condition of 'bush wife'[50] implies more than just enduring sexual violence; it ought to taken into account that women and girls are also forced to cook, to do household chores, raise their captor's children and avoid having sexual or sentimental relationships with someone other than their 'husband'.[51] These women are also victims of different types of physical aggression such as being beaten, branded and cut.

For Kalra, forced marriage can cause different types of negative consequences on the victims. This kind of union degrades and distorts the institution of marriage, because victims are not only forced to endure heinous abuses such as rape, sexual slavery, forced pregnancy, enslavement and torture (acts which are considered as CAH),[52] but they are also indefinitely and inevitably married to the men who victimize them. This further violates their right to freely choose a spouse. Thus, it would be wrong to consider that the horrors inflicted on victims of

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[41] *Ibid.,,* para. 89.

[42] *Ibid.*, para. 90.

[43] ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, *Trial Judgment*, February 4, 2021, Doc. No.: ICC-02/04-01/15, para. 2741.

[44] *Ibid.*, paras. 3082-3084.

[45] *Ibid.*, para. 3070.

[46] *Ibid.*, para. 2750.

[47] *Ibid.*, para. 2749.

[48] Frulli, M. (2008), 'Advancing International Criminal Law. The Special Court for Sierra Leone recognizes forced marriage as a 'new' crime against humanity', *Journal of International Criminal Justice*, Vol. 6, p. 1037.

[49] *Idem*.

[50] A term commonly used in Sierra Leone to describe victims of the crime of forced marriage.

[51] Scharf, M & Mattler, S. (2005), Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity, Case Research Paper Series in Legal Studies, *Case Western Reserve University*, Working Paper 05–35, pp. 4–5.

[52] Art. 2 of the SCSL.

forced marriage are less grievous violations of IHRL or International Humanitarian Law (IHL), merely because they are committed under the guise of marriage.[53]

Kerr arrives to the same conclusion from a different standpoint: it is not possible to equate forced marriage to the CAH of sexual slavery defined in ICL. This is because the principle of legality would require international tribunals to study forced marriages through the lens of an *actus reus* limited to sexual acts.[54] Nevertheless, forced marriage is multi-layered in nature, and different types of conduct, such as forced labor, are associated with it. Therefore, from the *nullum crimen, nulla poena, sine iure* perspective, it is not correct to state that forced marriage can constitute a CAH of sexual slavery.[55] According to Kerr, the CAH of "other inhumane acts" better reflects the purposes of ICL since '[...] the objective of [this] category [...] was to be a residual provision which covered crimes which were not specifically recognised as crimes against humanity, and therefore to fill in any 'loophole left open''.[56]

Finally, Mettraux stresses that, according to the ICC and the SCSL case law in the Katanga and AFRC cases, when an inhumane act is charged, unlike sexual slavery, '[...] it is legally irrelevant whether the underlying conduct is sexual or non-sexual in character, although this might constitute a relevant factual consideration when evaluating the (sufficient) gravity of the act'.[57] It ought to be noted that the harm resulting from forced marriage is not limited to physical consequences, but has additional negative aspects, such as a social impact on the victim.[58] Furthermore, 'the notion of forced marriage, as an inhumane act or as an underlying act of terror, could prove particularly useful as a prosecutorial device in that the notion is capable of capturing the kidnapping aspect of the offence, which might otherwise be hard to fit into other existing categories of crimes against humanity or war crimes'.[59]

4. Would it be possible to use 'cumulative convictions' for the CAH of sexual slavery and other inhumane acts as a result of forced marriage?

4.1. Introduction

To answer this question, it's essential to remember that the term 'cumulative convictions' refers to the concurrence of crimes, which, according to Ambos, can be divided into: (a) cases in which '[...] the same conduct fulfills different offences at the same time or the same offence at various times';[60] and (b) cases in which 'different forms of conduct fulfill different offences [that is to say] [...] accumulation of offences'.[61]

The first group of cases is comprised of both 'inter-categories' cases and 'intra-category' cases. In the so-called 'inter-categories' cases, the same conduct is associated with the contextual elements of more than one category of international crimes (for instance, the killing of civilians in an armed conflict which may amount to both a CAH and a war crime).[62] In turn, in the so-called 'intra-category' cases, the same conduct constitutes, at the same time, two or more crimes within the same category (e.g., rape and sexual slavery as CAH).

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[53] Kalra, M. (2001), 'Forced Marriage: Rwanda's Secret Revealed', *U.C. Davis Journal of International Law & Policy*, Vol. 7, No. 2, p. 56.

[54] Kerr, V. (2020), 'Should forced marriages be categorized as 'Sexual Slavery' or 'Other inhumane acts' in the International Criminal Law?', *Utrecht Journal of International and European Law*, Vol. 35, pp. 8.

[55] *Ibid.*, pp. 16-17.

[56] *Ibid.*, p. 7.

[57] Mettraux, G. (2020), International Crimes: Law and Practice: Volume II: Crimes Against Humanity. Oxford University Press. Vol 2. 797-798.

[58] *Idem.*

[59] *Idem.*

[60] Ambos, K. (2014), *Treatise on International Criminal Law Volume II: The Crimes and Sentencing*, Oxford University Press, Vol. 2, p. 246.

[61] *Idem.*

[62] *Idem.*

The Ongwen defense argued in its appeal brief, that ICL does not allow convictions for more than one crime in either 'inter-categories' cases or 'intra-category' cases. The defense contended that, as a result, if the same conduct (for example, murder) can be legally characterized as a war crime and as a CAH, the TC would have to choose to convict for one or the other crime (not for both of them), since there's 'a complete overlap of the facts'.[63] According to the Defense, the same holds true when the same conduct constitutes two different crimes within the same category (such as rape and sexual slavery as CAH). Otherwise, the fundamental rights of the convicted person would be affected, as he would be judged twice for the same conduct. Consequently, this is an issue that involves core aspects of ICL such as the distinction between crimes, the notion of 'relevant conduct' and the *ne bis in idem* principle that protects convicted persons from double jeopardy.[64]

A different view is held by the OPCV, which considers the Decision on the confirmation of charges issued by PTC II[65] and the judgment issued by TC IX [66] to be correct. According to the OPCV, cumulative convictions can only be entered when the relevant offenses have materially distinct elements, each requiring proof of a fact not required by the other. Contextual elements should also be taken into consideration for this purpose. Cumulative convictions are justified due to the relevance of comprehensively expressing and underscoring the defendant's conduct and the harm suffered by the victims.[67]

The OPCV also considers that cumulative convictions do not infringe upon the rights of the defendant since the ICC, ICTY and ICTR case law makes a distinction between cumulative charging, cumulative convictions and sentencing. Furthermore, cumulative convictions do not have any impact on the sentence to be served by the convicted person due to the practice of joint sentencing (an individual sentence is first imposed for each of the offenses, and a joint sentence is later decided after considering *inter alia* the seriousness of all offences and the personal circumstances of the convicted person).[68]

Thus, as noted by the Prosecutor, cumulative convictions, '[...] while having no impact in and of itself on the determination of the individual sentences for the crimes concerned, shall however be taken into account as part of the determination of the joint sentence with a view to ensuring that, in this sense, Dominic Ongwen is not punished more than once for the same underlying conduct and related consequences.[69]

4.2. The jurisprudence on cumulative convictions in 'inter-categories' cases

4.2.1. The jurisprudence of the International Criminal Tribunal for Rwanda

The first vestiges of cumulative convictions in ICL can be found in the Akayesu and the Kayishema and Ruzindana cases before the ICTR. In the Akayesu case, TC I stated that cumulative convictions would be limited to certain circumstances and would require a study on the potential harm that may be caused to the accused. Thus, it would only be admissible to convict an accused person for two different crimes related to the same set of facts, in the

[63] ICC, the Prosecutor v. Dominic Ongwen, Appeals Chamber, *Defence Appeal Brief Against the Convictions in the Judgment of 4 February, 2021*, October 19, 2021, Doc. No.: ICC-02/04-01/15, para. 289.

[64] Fernández, C. (2017), 'The International Criminal Court and the Celebici Test' , *Journal of International Criminal Justice,* Vol.15, No. 4, pp. 689-712.

[65] ICC, the Prosecutor v. Dominic Ongwen, Pre-trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen of 23 March, 2016*, March 23, 2016, Doc. No.: ICC-02/04-01/15, para. 32.

[66] ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, Trial Judgment, February 4, 2021, Doc. No.: ICC-02/04-01/15, paras. 2792, 2797 .

[67] ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, *CLRV Response to Defence 'Motion for Immediate Ruling on Standard to Assess Multiple Charging and Convictions'*, December 20, 2019, Doc. No.: ICC-02/04-01/15, para. 22.

[68] *Ibid.,* para. 16.

[69] ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, *Sentence*, May 6, 2021, Doc. No.: ICC-02/04-01/15, para. 149.

following circumstances: '[...] (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order to fully describe what the accused did'.[70] The expression 'in the following circumstances' used by the TC I can be interpreted to the extent that the criteria on which this initial test is based are alternative rather than cumulative (i.e., if a single element listed by the TC I is met, then this would be enough to enter cumulative convictions). Moreover, although TC I established three alternative criteria to enter cumulative convictions, it only focused on the first two.

In particular, in relation to entering cumulative convictions for CAH and war crimes resulting from violations of the Geneva Conventions, TC I stated that '[...] the offences under the Statute - genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II - have different elements and, moreover, are intended to protect different interests'.[71]

Nevertheless, according to TC I, '[...] it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g., genocide and complicity in genocide'.[72]

In the case of Kayishema and Ruzindana, TC II analyzed the so-called 'concurrence of the crime test', according to which genocide and CAH are categories of crimes that have elements that must be proven differently, and therefore cumulative convictions can be entered. In particular, TC II noted that 'some of the enumerated crimes under CAH would not be carried out with the objective to destroy a group in whole or in part; the primary requirement for genocide. For example, CAH of deportation or imprisonment would not generally lead to the destruction of a protected group.'[73] Furthermore, TC II highlighted that a '[CAH] must be committed specifically against a 'civilian population', whereas the crime of genocide requires the commission of acts pursuant to the destruction of 'members of a group'.[74] Finally, 'the discriminatory grounds under CAH include a type of discrimination not included under genocide, that is political conviction'.[75]

In the Semanza case, the AC also stated that contextual elements are to be considered to determine whether one crime is materially different from another. The AC stressed that '[a] conviction for genocide under Article 2 of the Statute requires proof of an 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group'.[76] This is completely different from what is required to support a conviction for CAH: the existence of a 'widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'.[77] On this basis, the AC decided that both genocide and CAH convictions, were admissible, even if based on the same facts.[78]

4.2.2 The jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY)

[70] ICTR, the Prosecutor v. Jean-Paul Akayesu, Chamber I, *Judgment,* September 2, 1998, Case. No.: ICTR-96-4-T, para. 468.
[71] *Ibid*., para. 469.
[72] *Ibid*., para. 468.
[73] ICTR, the Prosecutor v. Clément Kayishema & Obed Ruzindana, Chamber II, *Judgment*, May 21, 1999, Case No.: ICTR-95-1-T, para. 630.
[74] *Ibid.,* para. 631.
[75] *Ibid.*, para. 632.
[76] ICTR, the Prosecutor v. Laurent Semanza, Appeals Chamber, *Judgment*, May 20, 2005, Case No.: ICTR-97-20-A, para. 318.
[77] *Idem.*
[78] *Idem.*

The practice of cumulative charging at the ICTY was first mentioned in the Tadic case, although it was not further developed beyond the Prosecution's argument, which claimed that '[t]he accused may be charged and convicted for as many crimes as there are facts in the case if there is a concurrence.'[79] Not until the Kupreškić case, was the practice of cumulative charging substantially developed.

Concerning cumulative convictions, the TC in the Kupreškić case applied the 'Blockburger test', established by the United States Supreme Court in the Blockburger v. United States of America case. According to this test, '[t]he applicable rule is such that where the same act constitutes an infringement of two distinct statutory provisions, the test to be applied in determining whether there are two offenses or only one, is whether each provision requires proof of an additional fact not required in the other.'[80]

Subsequently, in the Celebici Case, the AC applied the so-called 'reciprocal specialty test' or 'Celebici test', according to which, 'for reasons of fairness to the defendant and under the consideration that only different offenses can justify multiple convictions, it is concluded that multiple criminal convictions under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision involved contains a materially distinct element not contained in the other. One element is materially distinct from another if it requires proof of a fact not required by the other.'[81] According to the AC, when the offenses charged do not have a materially different element between each other '[t]he conviction must be upheld under the more specific provision. Thus, if a set of facts is governed by two provisions, one of which contains an additional materially distinct element, then a conviction must be entered under that provision alone.'[82]

Based on the foregoing, the AC stressed that it is not permissible to convict, in respect of the same act of violence, for war crimes under Article 3 of the ICTY Statute and for grave breaches of the Geneva Conventions under Article 2. The reason for the AC's decision is that these crimes don't have materially different contextual elements.[83] Both crimes require as contextual element 'the connection of the individual act to the existence of an armed conflict of an international nature'. Nevertheless, the AC found that cumulative convictions could be entered in cases of concurrence between CAH and war crimes.[84]

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[79] ICTY, the Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo, Appeals Chamber, *Judgment*. February 20, 2001, Case No.: IT-96-21-A, para. 397.

[80] Scotus, Blockburger v. United States. *Judgment of the Circuit Court of Appeals*, January 4, 1932, para 12. In ICTY, Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, Kupreskic et al. Trial Chamber, *Judgment*, January 14, 2000, Case No.: IT-95-16-T, para 680, the TC explained the following: 'One test (Blockburger test) has been enunciated and spelled out by certain national courts, such as those in the United States. The Supreme Court of Massachusetts in Morey v The Commonwealth (1871) for instance held that: 'A single act may be an offence against two statutes: and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' Cassese (2009) warns that '[...] if the Blockburger test is not met, and one offence falls entirely within the ambit of the other offence, since it does not requiere an additional element, then the charges are cumulative and the Tribunal is precluded from entering cumulative convictions and should enter a conviction on the more specific of the cumulative charges, reflecting the principles enshrined in the maxim in toto iure generi per specimen derogatur (or lex specialis derogar generall). In short, when all the legal requirements for a lesser offence are met in the commission of a more serious offence, a conviction on the more serious count consumes the lesser offence and fully describes the criminal conduct of the accused'. In Cassese, A. *et al.* (2009), 'The Oxford companion to international criminal justice', *Oxford University Press*, p. 257.

[81] ICTY, the Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo, Appeals Chamber, *Judgment*. February 20, 2001, Case No.: IT-96-21-A, para. 412.

[82] *Ibid.*, para. 413.

[83] *Ibid.*, paras. 414, 421, 427.

[84] According to the AC, 'Article 3 (war crimes) requires a close link between the acts of the accused and the armed conflict; this element is not required by Article 5. On the other hand, Article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population; that element is not required by Article 3. Thus, each Article has an element requiring proof of a fact not required by the other. As a result, cumulative convictions under both Articles 3 and 5 are permissible.' In ICTY, the Prosecutor v. Goran Jelisic, Appeals Chamber, Judgment, 5 July, 2001, Case No.: IT-95-10-A, para. 82.

Nevertheless, two out of the five AC judges (Hunt and Bennouna), found that the Celebici test was conflicting because it caused prejudice to the defendant, since it 'fails to take into account the punishment and social stigmatization inherent in conviction for a crime. Moreover, the number of offenses for which a person is convicted may have some impact on the sentence that will ultimately be served when national laws are applied, e.g., early release of various types'.[85] Additionally, for these two judges, the test should not be based on the contextual elements of each crime because if they are taken into consideration, it is likely that the conduct will always fit into two categories of crimes.[86] Consequently, they proposed to compare only the *actus reus* and *mens rea* of the crimes concerned, setting aside the comparison of their contextual elements.[87]

4.2.3. The jurisprudence of the International Criminal Court

In the Bemba case, TC VII entered cumulative convictions and explained that it did so because each of the crimes has a materially different element.[88] TC VII said that this distinction cannot be merely apparent, but rather clear and concrete.[89] Likewise, according to TC VII, contextual elements are a constitutive part of the elements of the crimes, so they must be considered for the purpose of deciding whether to enter cumulative convictions.[90] Moreover, according to TC VII, the crimes for which cumulative convictions are entered should have the same penalty.[91]

Subsequently, TC VI underlined in the Ntaganda case that the CAH have elements that are materially different from war crimes. This is because the former requires proving the occurrence of a systemic or generalized attack against the civilian population, while the latter requires proof that the crimes were committed within the context of an armed conflict.[92]

4.2.4. The jurisprudence of hybrid courts

Regarding the SCSL, during the Civil Defense Forces (CDF) case, TC I received requests from both the Prosecutor's Office and the Defense to impose one sentence without mentioning each of the crimes committed. Nevertheless, TC I dismissed such requests because of two main reasons: (i) although the statutory framework allows it, in order to clearly expose the punishable conduct of the accused, it is preferable to differentiate each of the crimes[93]; and (ii) when a joint sentence is imposed, the penalty does not necessarily increase.[94]

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[85] ICTY, the Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo, Appeals Chamber, *Separate and Dissenting Opinion Of Judge David Hunt And Judge Mohamed Bennouna*, February 20, 2001, Case No. IT-96-21-A, para. 23.
[86] *Ibid*., para. 31.
[87] *Ibid.,* paras 26, 31.
[88] When discussing an element that is materially different from another crime, the test applied is the one initially used in the 'Blockburger v USA' case, which was used continuously in the Akayesu and the Celebici cases.
[89] ICC, the Prosecutor v. Jean-Pierre Bemba Gombo et. al, Appeals Chamber, *Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled* '*Judgment pursuant to Article 74 of the Statute*', March 8, 2018, Doc. No.: ICC-01/05-01/13-2275-Red, para. 740.
[90] ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, *Prosecution's Response to Defence's 'Motion for Immediate Ruling on Standard to Assess Multiple Charging and Convictions'*, December 20, 2019, Doc. No.: ICC-02/04-01/15, paras. 33, 35; ICC, the Prosecutor v. Jean- Pierre Bemba Gombo, Appeals Chamber, *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's ?Judgment pursuant to Article 74 of the Statute'*, June 8, 2018, Doc. No.: ICC-01/05-01/08 A, para. 117; ICC, the Prosecutor v. Jean- Pierre Bemba Gombo, Pre-trial Chamber, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, June 15, 2009, Doc. No.: ICC-01/05-01/08, paras. 84-85.
[91] ICC, the Prosecutor v. Jean-Pierre Bemba Gombo, Trial Chamber III, *Decision on Sentence pursuant to Article 76 of the Statute*, June 21, 2016, Doc. No.: ICC-01/05-01/08-3399, para. 94.
[92] ICC, the Prosecutor v. Bosco Ntaganda, Trial Chamber VI, *Judgment*, July 8, 2019, Doc. No.: ICC-01/04-02/06-2359, para. 1203.
[93] SCSL, the Prosecutor v. Moinina Fofana & Allieu Kondewa, Trial Chamber I, *Judgment on the sentencing of Moinina Fofana and Allieu Kondewa*, October 9, 2007, Case No.: SCSL-04-14-T-796, para. 97.
[94] *Ibid.,* p. 33.

The Special Tribunal for Lebanon (STL) also dealt with cumulative convictions in the Ayyash case. According to the TC, '[t]he practice of Lebanese courts appears consistent with articles 181 and 205 of the Code in imposing sentences for cumulative convictions. The decisions reviewed by the TC also illustrate that Lebanese courts have imposed a single sentence for convictions of intentional homicide (or attempted intentional homicide) of multiple people'.[95] Consequently, '[h]aving considered Lebanese sentencing practice and the international case law, the Trial Chamber will exercise its discretion to impose separate sentences on each count. This approach is consistent with the practice of the Lebanese courts. It allows the Trial Chamber to avoid double counting, to clearly set out its assessment and findings with respect to the gravity of each crime for which it convicted Mr Ayyash, and to impose distinct sentences for each to reflect his culpability in a precise manner'.[96]

Finally, the TC of the ECCC applied the Celebici test in the Kaing Guek Eav alias Duch case (case 001). According to the TC, materially different elements are decisive for the application of cumulative convictions.[97]

4.3 The jurisprudence on cumulative convictions in 'intra-category' cases

As stated above, 'intra-category cases' are cases in which the same conduct constitutes, at the same time, two or more crimes within the same category (e.g., CAH). In the next sections, the ICTR, ICTY, SCSL and ECCC case law on cumulative convictions in this type of case will be analyzed. No ICC case law is dealt with since it has not addressed this question to date.[98]

4.3.1. The jurisprudence of the International Criminal Tribunal for Rwanda (ICTR)

In the Rutaganda case, TC I stated that the CAH of murder and extermination do not have materially distinct elements, since 'murder is a killing of one or more individuals, whereas extermination is a crime which is directed against a group of individuals'.[99] Consequently, TC I did not enter cumulative convictions for both crimes. The same approach was followed in the Ntakirutimana[100] and the Ntabakuze cases.[101]

4.3.2. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY)

[95] STL, the Prosecutor v. Salim Jamil Ayyash, The Trial Chamber, *Sentencing Judgment*, December 11, 2020, Case No.: STL-11-01/S/TC, para. 226.

[96] *Ibid.,* 238. Ayyash's sentence was based on the penalties provided for in the Lebanese Penal Code. He was sentenced to life imprisonment for each of the crimes subject to the conviction. Moreover, he served the different life sentences concurrently.

[97] ECC, the Prosecutor v Kaing Guek Eav alias Duch, Trial Chamber, Judgment, July 26, 2010, Case No.:001/18-07-2007/ECCC/TC, para. 560. In this case, the SPI affirms, based on ICTY jurisprudence, that '[w]here the Accused's conduct fulfills the elements of different offences, the Chamber will evaluate the impact of multiple convictions. The ad hoc tribunal jurisprudence has acknowledged that multiple convictions serve to 'describe the full culpability of a particular accused or provide a complete picture of his criminal conduct'.

[98] In an amicus curiae presented by 'The Women's Initiative for Gender Justice' in the Bemba Case, it was considered that the existence of sexual crimes was analyzed in a very superficial way. It affirmed that the Chamber ruled in at least three cases that the elements of torture are subsumed within the elements of rape and that the Chamber could have referred to existing jurisprudence such as that of Prosecutor v. Furundzija, where Witness D, who was forced to monitor the repeated violations of Witness A, was considered a victim of torture. In the ICC, the Prosecutor v. Jean-Pierre Bemba Gombo, *Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence*, July 31, 2009, para. 28.

[99] ICTR, the Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Trial Chamber I, *Judgment and sentence*, December 6, 1999, Case No.: ICTR-96-3-T, para. 422.

[100] ICTR, the Prosecutor v. Elizaphan Ntakirutimana & Gérard Ntakirutimana, Appeals Chamber, December 13, 2004, Cases Nos.: ICTR-96-10-A & ICTR-96-17-A, para 542.

[101] ICTR, the Prosecutor v. Aloyz Ntabakuze, Appeals Chamber. *Judgment*, May 8, 2012, Case No.: ICTR-98-41A-A, paras. 259-261.

The question of cumulative convictions in 'intra-category' cases was dealt with for the first time at the ICTY in the Kunarac case. In this case, the defense claimed that cumulative convictions should be entered for torture and rape as CAH because only one crime (rape) had been committed, since the intention behind the rapes was to obtain sexual gratification (and not to inflict pain). Nevertheless, the TC and the AC rejected this position. According to the AC, '[…] torture and rape each contain a materially distinct element not contained by the other […] . That is, that an element of the crime of rape is penetration, whereas an element for the crime of torture is a prohibited purpose, neither element being found in the other crime'.[102] As a result, the AC found that the TC had not erred in entering cumulative convictions for torture and rape as CAH.[103]

In the Kunarac case, the TC and the AC also acknowledged the possibility of entering cumulative convictions for slavery and rape as CAH. In particular, the AC found that 'slavery, even if it is based on sexual exploitation, is a different offence than rape.'[104]

Subsequently, in the Krnojelac,[105] Vasiljevic,[106] and Krstic[107] cases, the AC analyzed the CAH of persecution and murder, rejecting cumulative convictions for both crimes. The AC considered that the CAH of murder was included within the CAH of persecution (through murder),[108] because, by requiring the intent to discriminate against the victims, persecution constitutes a more specific crime.[109] The same was held in the Krstic case,[110] in relation to the CAH of persecution and forcible transfer as "other inhuman act."[111]

Nevertheless, a few months later, the AC changed its approach in the Kordic and Cerkez case and accepted cumulative convictions for persecution and imprisonment as CAH. According to the AC, '[t]he definition of persecution contains materially distinct elements that are not present in the definition of imprisonment under Article 5 of the Statute: the requirement of proof that the act or omission discriminates in fact *and* proof that the act or omission was committed with specific intent to discriminate. On the other hand, the offence of imprisonment requires proof of the deprivation of the liberty of an individual without due process of law, regardless of whether the deprivation of liberty discriminates in fact or was specifically intended as discriminatory, which is not required by prosecutions.'[112]

Subsequently, in the Stakic case, the AC found that the CAH of persecution and murder required materially different elements: while in the CAH of persecution it must be proven that an act or omission is carried out with the specific intent to discriminate, in the CAH of murder

[102] ICTY, the Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic, Appeals Chamber, *Judgment*, 12 June, 2002, Case. No.: IT-96-23/1-A, para. 179.

[103] Ibid., para. 185. The AC based its decision on the case law of the inter-American and European human rights Courts. See, IACHR, Fernando & Raquel Mejía v Peru, *Judgment*, March 1, 1996, Case No.: 10,970, Report No. 5/96, Inter American Yearbook on Human Rights, p. 1120; ECtHR, Aydin v Turkey, *Opinion of the European Commission of Human Rights*, March 7, 1996, paras. 186, 189; TIPY, the Prosecutor v. Dragoljub Kunarac Radomir Kovac & Zoran Vukovic, Appeals chamber, *Judgment*, June 12, 2002, Case No.: IT-96-23 & IT-96-23/1-A, paras. 183-184.

[104] *Ibid.,* para. 186.

[105] ICTY, the Prosecutor v. Milorad Krnojelac, Appeals Chamber, *Judgment,* September 17, 2003; Case No.: IT-97-25-A, para. 188.

[106] ICTY, the Prosecutor v. Mitar Vasiljevic, Appeals Chamber, *Judgment*, February 25, 2004, Case No.: IT-98-32-A, para. 146.

[107] ICTY, the Prosecutor v. Radislav Krstic, Appeals Chamber, *Judgment,* April 19, 2004, Case No.: IT-98-33-A, paras. 231-232.

[108] *Ibid.*,230.

[109] *Ibid.,* paras. 231- 233.

[110] *Ibid.*, para. 230.

[111] *Ibid*., para. 231.

[112] ICTY, the Prosecutor v. Dario Kordic & Mario Cerkez, Appeals Chamber, *Judgment,* December 18, 2004, Case No.: IT-95-14/2-A, para. 1043.

it is required that the accused causes the death of one or more persons.[113] The AC also found in the Stakic case the correctness in law of entering cumulative convictions for the CAH of deportation and persecution,[114] since deportation requires a materially different element (non-voluntary transfer of population across an international border), which is not part of the crime of persecution. The AC reached the same conclusion with respect to the CAH of persecution and extermination, and the CAH of persecution and forcible transfer as an " inhumane act "(the latter takes place in the territory of a State without crossing any border).[115]

4.3.3. The jurisprudence of hybrid courts

In case 002 before the ECCC, the TC found the defendants liable for the CAH of persecution, extermination and other inhumane acts. The TC found that each of these crimes have at least one materially distinct element. The CAH of persecution requires a discriminatory intent, the CAH of extermination requires a mass killing, and the CAH of other inhuman acts requires serious injury to physical or mental integrity or a serious attack on human dignity. Accordingly, the TC entered cumulative convictions for these three offenses.[116]

Likewise, the SCSL, in the CDF case,[117] also entered cumulative convictions (together with a joint sentence) for collective punishment (provided for in Article 3(a) of the SCSL) and pillaging (contained in Article 3(f) of the SCSL) as war crimes committed in non-international armed conflicts (breaches of common Article 3 to the Geneva Conventions or Additional Protocol II).

As a result, although the relevant crimes are part of the same category of CAH or war crimes, they have materially distinct elements that make it possible to enter cumulative convictions.[118]

4.4. Doctrine

The discussion on cumulative convictions is not limited to the case law of international and hybrid tribunals, but has also been dealt with by doctrine. According to Van den Herik, entering cumulative convictions in 'inter-category' cases is a way to show everything that happened in violent situations such as the Rwandan genocide. For her, cumulative convictions for genocide and CAH 'play[s] an important role in the vindication of crimes committed against Hutu individuals', allowing 'to describe the full criminal conduct of an accused'.[119] This is possible since both categories of offenses have different material elements,[120] because, as Ambos and Wirth have emphasized in relation to the Kayishema and Ruzindana case, 'genocide is a crime committed against a group of people, whereas CAH targeted the basic rights of individuals on a vast scale.'[121]

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[113] ICTY, the Prosecutor v. Milomir Stakic, Appeals chamber, *Judgment*, March 22, 2006, Case No.: IT-97-24-A, para. 359.

[114] *Ibid.,* para, 360.

[115] *Ibid*., paras. 360-364.

[116] ECCC, the Prosecutor v. Nuon Chea & Khieu Samphan, Trial Chamber, *Judgment,* November 16, 2018, Case No.: 002/02, paras., 1059-1060.

[117] SCSL, the Prosecutor v. Moinina Fofana & Allieu Kondewa, Trial Chamber I, *Judgment on the sentencing,* October 9, 2007, Case No.: SCSL-04-14-T-796. para. 97.

[118] STL, the Prosecutor v. Salim Jamil Ayyash, The Trial Chamber, *Sentencing Judgment*, December 11, 2020, Case No.: STL-11-01/S/TC, paras. 235-238.

[119] This is reflected in criterion number three of the test proposed in the Akayesu case, which indicates that cumulative convictions may occur in the scenario in which they contribute to a complete understanding of the defendant's criminal conduct. Van den Herik, L. (2005), 'The Contribution of the Rwanda Tribunal to the Development of International Law', *Developments in International Law,* Vol 53, p. 255.

[120] Therefore, 'in the case of genocide, only those who belong to the group or are perceived as belonging to the group can be considered victims, while any individual can be a victim of an HLC regardless of his or her origin, provided that the individual is part of the civilian population. From this perspective, it is important that genocide and HLCs are cumulatively imputed, and that cumulative convictions are possible.' Van den Herik, L. (2005), 'The Contribution of the Rwanda Tribunal to the Development of International Law', *Developments in International Law,* Vol 53, p. 255.

[121] *Idem.*

Regarding cumulative convictions in 'intra-category' cases, Boas, Bischoff and Reid also support their application when the same facts amount to two or more CAH (e.g., murder and persecution), each containing at least one materially distinct element. Nevertheless, other authors such as Erdei prefer to emphasize that the application of the Celebici test has left largely inconsistent results in the ICTY AC case law.[122]

4.5. Entering cumulative convictions for the CAH of sexual slavery and other inhumane acts based on the same facts of forced marriage

As seen above, forced marriage is considered by international case law and doctrine as a CAH. Nevertheless, there is no agreement on whether if should be considered as CAH of sexual slavery or as CAH of "other inhuman acts". Moreover, the question arises as to whether cumulative convictions for both sexual slavery and other inhuman acts could be entered in cases of forced marriage.

To address this question, it should be noted at the outset that when referring to crimes belonging to the same category (e.g. CAH), it is not necessary to analyze their contextual elements. Likewise, as international case law has repeatedly pointed out, the CAH of other inhumane acts '[...] serves as a residual category designed to punish acts or omissions not specifically listed as [CAH] provided these acts or omissions meet the following requirements: (i) inflict great suffering, or serious injury to body or to mental or physical health; (ii) are sufficiently similar in gravity to the acts referred to in Article 2.a to Article 2.h of the Statute; and (iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act.'[123]

This means that sexual conduct inherent to forced marriage that constitutes sexual slavery will preferably be subject to conviction for this crime, while nonsexual conduct inherent to forced marriage could lead to a conviction for "other inhumane acts". This would make it possible to reflect as fully as possible the punishable conduct of the accused.

As we have seen, the CAH of sexual slavery has two main requirements under Article 7 (1)(g) of the ICCS and in the EC: (a) exercising one of the attributes of the right of ownership (such as buying, selling, lending, bartering, or all of them) over the victims, or the imposition on the latter of some similar type of deprivation of their autonomy[124]; and (b) to force the victims to perform one or more acts of a sexual nature.[125] Consequently, as Ambos and Triffterer point out, the social values protected in this criminal offense are the right to sexual autonomy, as well as the right to change this situation.[126]

According to the ICC trial judgment in the Katanga case, from an objective perspective, the accused must have exercised the '[p]owers attaching to right of ownership", which 'must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form

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[122] Erdei, I. (2011), 'Cumulative Convictions in International Criminal Law: Reconsideration of a Seemingly Settled Issue', *Suffolk Transnational Law Review*, Vol. 34, No. 2, p. 335; ICTY, the Prosecutor v. Radislav Krstić, Appeals Chamber, *Judgment*, April 19, 2004, Case No.: IT-98-33-A, para. 231.

[123] SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu, Appeals Chamber, *Judgment,* February 22, 2008, Case No.: SCSL-2004-16-A, para. 198; ICTY, the Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipović, Dragan Papić, Vladimir Santić, Kupreskic et al., Trial chamber *Judgment,* January 14, 2000, Case No.: IT-95-16-T, para. 653; ICTY, Prosecutor v. Dario Kordic & Mario Cerkez, Appeals chamber, *Judgment*, December 17, 2004, Case No.: IT-95-14/2-A, para. 117; ICC, the Prosecutor v. Alfred Rombhot Yekatom & Patrice-Edouard Ngaïssona, *Public Redacted Version of Yekatom Defence Reply to Prosecution Response to Defence Confirmation Submissions,* October 10, 2009, Doc. No.: ICC-01/14-01/18, 10, para 44.

[124] ICC, the Prosecutor v. Germain Katanga, Trial Chamber II, *Judgment pursuant to article 74 of the Statute*, March 7, 2014, Doc. No.: ICC-01/04-01/07, para. 975.

[125] *Ibid.*, para. 978.

[126] Ambos, K. & Triffterer, O. (2016), *The Rome Statute of the International Criminal Court: a commentary*, Oxford University Press. pp. 212 y 214.

of autonomy.'[127] Furthermore, he must have compelled the victim to engage in one or more acts of a sexual nature. From a subjective perspective, this implies that the defendant 'must have been aware of individually or collectively exercising one of the attributes of the rights of ownership over a person and forced such person to engage in one or more acts of a sexual nature.'[128] Witness P-132 in the Katanga case clearly reflects this situation by stating the following: 'You know full well that when someone takes you for his wife, he can have sexual intercourse whenever and however he wishes. He told me that I had become his wife. I could not refuse.'[129]

Recently, TC IX established in the Ongwen case that both the accused and Joseph Kony (supreme leader of the LRA) had the authority to designate the abducted female population as 'wives' of male members of the Sinia brigade. In particular, TC IX explains how Ongwen used his position as commander of this brigade to impose marriages. Moreover, as ceremonies to mark the alleged marriages were not frequent, the abducted women and girls were considered wives from the moment they were forced into sexual relations with the man whom they were assigned to and could not refuse under threat of death.[130]

Compared to the CAH of sexual slavery, the CAH of other inhumane acts include not only sexual acts, but acts of other nature that entail severe suffering, such as domestic servitude,[131] taking care of the children[132] and their captors, among other forced labor acts.[133] Additionally, the community was heavily affected: these unions caused the breaking of important social ties, the weakening of the emotional, familiar, cultural and spiritual structures of the people, and the impact on the way they relate to the spirits and their ancestors, thus cutting off their sense of predictability and security.[134]

Furthermore, the institution of marriage is itself degraded and distorted, since the victims are not only forced to endure acts of rape, sexual slavery, forced pregnancy and torture (all of which are recognized as CAH), but are also indefinitely married to their perpetrators, which violates their right to freely choose their spouse, causing them intense psychological and moral suffering.[135] These criminal acts led to the stigmatization of all victims, considering that women who are abandoned, divorced, in a polygamous marriage or widowed are often discriminated against and excluded from the social circles of their communities, thus ultimately affecting their children.[136]

In conclusion, there is no obstacle to entering cumulative convictions for the CAH of sexual slavery and other inhuman acts in cases of forced marriage. Undoubtedly, this allows a more comprehensive description of the convicted person's punishable conduct.

5. Conclusions

[127] ICC, the Prosecutor v. Germain Katanga, Trial Chamber II, *Judgment pursuant to article 74 of the Statute*, March 7, 2014, Doc. No.: ICC-01/04-01/07, para. 975.
[128] *Ibid.*, para 981.
[129] *Ibid.,* para 1000.
[130] ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, *Trial Judgment*, February 4, 2021, Doc. No.: ICC-02/04-01/15, para. 216.
[131] SCSL, the Prosecutor v. Charles Chankay Taylor, Trial Chamber II, *Judgment,* May 18, 2012, Case No.: SCSL-03-01-T, para. 425.
[132] Scharf, M. & Mattler, S. (2005), *'Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity',* Case Legal Studies Research Paper No. 05-35, African Perspectives on International Criminal Justice*,* p. 4.
[133] Kerr, V. (2020), 'Should forced marriages be categorized as 'Sexual Slavery' or 'Other inhumane acts' in the International Criminal Law?', *Utrecht Journal of International and European Law*, Vol. 35, No. 1, p. 5.
[134] LeVine, P. (2010), *Love and Dread in Cambodia: Weddings, Births, and Ritual Harm Under the Khmer Rouge*, National University of Singapore Press, pp. xvii-xviii.
[135] Frulli, M (2008), 'Advancing International Criminal Law. The Special Court for Sierra Leone recognizes forced marriage as a 'new' crime against humanity', *Journal of International Criminal Justice*, Vol. 6, p. 1037.
[136] de Langis, T., Strasser, J, Kim, T. & Taing, S. (2014), *Like Ghost Changes Body: A Study on the Impact of Forced Marriage under the Khmer Rouge Regime,* Transcultural Psychosocial Organization, pp. 97-99.

This article has been triggered by the appeal filed by the defense of Dominic Ongwen before the AC of the ICC, who considered that the application of cumulative convictions by the TC was erroneous, based on the argument that several convictions rest on the same facts. For the Defense, this implies a violation of the principle of *non bis in idem*. Consequently, the defense proposes that forced marriage charges should be considered as a CAH of sexual slavery. On the other hand, the OPCV submits that forced marriage fits better in the CAH of "other inhumane acts".

The position of the Defense is underpinned by the early case law of the SCSL and by authors such as Mazurana and Gong-Gershowitz, who are of the opinion that the sexual element inherent to forced marriage tends to dominate over the other aspects of this practice, including the forced labour and the physical and psychological mistreatment. This is due to the fact that the latter are a consequence of the natural coercion of a forced marriage (all acts of non-sexual mistreatment and forced labor are normally considered to be part of the role of a wife).

On the other hand, the OPCV's position is supported by the jurisprudence of the AC of the SCSL in the AFRC case and of the TC of the ECCC in case 002/02. It is also supported by authors such as Frulli, Scharf and Mattler and Mettraux who consider that mistreatment of a non-sexual nature is being minimized by convicting only for the CAH of sexual slavery, when in reality, forced marriage presents a much greater complexity. By not taking into account the continuity of the other transgressions, a veil is placed over these other forms of mistreatment that go far beyond the mere fact of being taken as wives, and that affect societal values other than those protected by the CAH of sexual slavery.

The analysis conducted in this paper, leads to the conclusion that the most appropriate way to resolve the issue in question is by integrating both approaches, as suggested by the STL. This can be achieved by entering cumulative convictions against Dominic Ongwen for the CAH of sexual slavery and other inhumane acts, based upon the same factual elements of forced marriage. This would provide greater specificity of all aspects of forced marriage without ignoring the acts of non-sexual mistreatment and forced labor suffered by the victims.

ANEXO 1 / ANNEX 1

Índice de abreviaturas / List of Abbreviations

AFRC	Armed Forces Revolutionary Council
art(s).	Artículo(s) / Articles
CDF	Civil Defense Forces
CJI / ILC	Clínica Jurídica Internacional / International law clinic
CLH / CAH	Crímenes de Lesa Humanidad / Crime(s) Against Humanity
CPI / ICC	Corte Penal Internacional / International Criminal Court
CPK	Partido Comunista de Kampuchea / Communist Party of Kampuchea
DIDH / IHRL	Derecho Internacional de los Derechos Humanos/International Human Rights Law
DIH / IHL	Derecho Internacional Humanitario / International Humanitarian Law
DIP / ICL	Derecho Internacional Penal / International Criminal Law
EC	Elementos de los Crímenes de la Corte Penal internacional / Elements of Crimes of the Rome Statute
ECPI /ICCS /RS	Estatuto de la Corte Penal Internacional / International Criminal Court Statute / Rome Statute
Ed(s).	Editor(es)/Editors
ETEL / STLS	Estatuto del Tribunal Especial para el Líbano / Special Tribunal for Lebanon Statute
ETESL / SCSL	Estatuto de Especial para Sierra Leona / Special Court for Sierra Leone
ETPIY / ICTYS	Estatuto del Tribunal Penal Internacional para la ex Yugoslavia / International Criminal Tribunal for the Former Yugoslavia Statute
ETPIR / ICTRS	Estatuto del Tribunal Penal Internacional para Ruanda/International Criminal Tribunal for Rwanda Statute
IIH	Instituto Ibero-Americano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional / Iberoamerican Institute of The Hague for Peace, Human Rights and International Justice
MSJC	Massachusetts Supreme Judicial Court

Núm. / No.	Número / Number
OPCV/ODPVCPI	Office of Public Counsel for Victims of the International Criminal Court / Oficina de Defensoría Pública de Víctimas de la Corte Penal Internacional
P. / pp.	Página(s) /Page(s)
Para(s)	Párrafo(s) / Paragraph(s)
RUF	Revolutionary United Front
SA / AC	Sala de Apelaciones / Appeals Chamber
SCP(s) / PTC	Sala(s) de Cuestiones Preliminares / Pre-Trial chamber
SETC / ECCC	Salas Extraordinarias en los Tribunales de Camboya / Extraordinary Chambers in the Courts of Cambodia
SPI(s) / TC	Sala(s) de Primera Instancia / Trial Chamber
TEL / STL	Tribunal Especial para el Líbano / Special Tribunal for Lebanon
TESL / SCSL	Tribunal Especial para Sierra Leona / Special Court for Sierra Leone
TPIR / ICTR	Tribunal Penal Internacional para Ruanda / International Criminal Tribunal for Rwanda
TPIY / ICTY	Tribunal Penal Internacional para la ex Yugoslavia / International Criminal Tribunal for the Former Yugoslavia
SCOTUS	Supreme Court of The United States